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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

FORD MOTOR COMPANY, PETITIONER

v.

KATHY ANDERSEN, ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), preempts a suit by union members subject to a collective bargaining agreement who contend that termination of their employment violated state contract and tort law.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

In addition to the parties named in the caption, the following persons were appellants in the court of appeals and are respondents in this Court: Sue Bydzovsky, Mike DiSanto, Jim Donaldson, Randy Engel, Janet Frost, Carolyn Gillispie, Denise Gomez, Nancy Haider, Tommy Haines, Dean Hedberg, Clyde Hughes, James Koshenina, Ann LaBelle, Scott Maki, Dan Matykiewicz, Jeff McFarland, Liz McFarland, Jean McNally, Ken McNamara, Audrey Moen, Sandra Moshier, Janet Murphy, Lorna Olson, Mark Olson, Terry Pedersen, Bessie Poole, Barbara Pratt, Tony Quevedo, D.J. Rierson, Terri Savage, Betty Sims, Jeffrey Sorenson, Keith Swan, Tom Sypnieski, and James Wenzel. In addition, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America was an appellee in the court of appeals and is a respondent in this Court.

A listing of petitioner's subsidiaries (other than wholly owned subsidiaries) and affiliates is set forth at App. D, *infra*, 20a-22a.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 803 F.2d 953. The order of the district court (App. C, *infra*, 18a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1986, and a petition for rehearing was denied on January 22, 1987 (App. B, *infra*, 17a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce • • • may be brought in any district court of the United States having jurisdiction of the parties • • •.

Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), provides in pertinent part:

> Final adjustments by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT

Respondents Kathy Andersen, *et al.*, are former probationary employees of petitioner Ford Motor Company ("Ford") who were dismissed from their employment when they were displaced or "bumped" by other Ford employees with greater seniority. Rather than exhaust their rights and remedies under the collective bargaining agreement between Ford and their union, respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW" or "the Union"), respondents brought suit in state court challenging their dismissals under various state law tort and contract theories. Because resolution of respondents' lawsuit would necessitate analysis of the collective bargaining agreement between Ford and the UAW and would conflict with the federal policy favoring resolution of labor disputes by arbitration, federal labor law preempts these state law claims.

1. *The Ford-UAW Collective Bargaining Agreement.* Petitioner Ford Motor Company is an employer engaged in commerce within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(2), (6), and (7). C.A. App. 23-24. Respondent UAW is the duly recognized collective bargaining representative for all of Ford's hourly production or "contract unit" employees. *Id.* at 66. Respondents Andersen, *et al.*, were contract unit employees at Ford's Twin Cities assembly plant in St. Paul, Minnesota, and were represented by the UAW. *Id.* at 24-25.

During all times relevant to this case, a collective bargaining agreement was in effect between Ford and the UAW that set forth the terms and conditions of employment, including provisions governing wages, hours, benefits, working conditions, seniority, and discharge. In particular, Article VII of the agreement contained a comprehensive set of rules for the presentation and resolution of employee grievances. The grievance procedure expressly extended to claims regarding layoff or dismissal, including claims by probationary employees such as respondents, who had 30 days or more employment with the company. C.A. App. 70-71.

Section 1 of Article VII of the collective bargaining agreement provided that the Union alone, as the exclusive representative of the employees, could file a grievance asserting a violation of the agreement. C.A. App. 68. This section also provided that grievances that were not processed or otherwise "disposed of" would be considered settled and that such settlement "shall be final and binding upon the Company, the employe or employes involved, the Union and its members." *Ibid.* The grievance procedure culminated in binding arbitration by an Umpire. *Id.* at 69.[1]

2. *The Facts Of This Case.* During the summer and fall of 1983, Ford began hiring employees in anticipation of a change in production schedules to begin in December 1983 at its Twin Cities assembly plant. In 1982, Ford and the UAW had negotiated a "preferential placement" agreement under which Ford employees on layoff

[1] The rights of employees under this grievance system were further expanded by a Letter of Understanding between Ford and the UAW dated October 5, 1976 (C.A. App. 265-266). That letter agreement stated that Ford would reinstate a grievance at the request of the Union if an affected employee successfully appealed the Union's unfavorable disposition of his grievance through the intra-union appeal procedure. See C.A. App. 79-88 (UAW appeal process).

from their "home" plants who retained seniority rights could obtain employment at other Ford plants either by filling new vacancies or, in certain instances, by displacing probationary employees. See C.A. App. 77-78. After most of the vacancies at the Twin Cities plant had been filled through the "preferential placement" process, respondents were offered employment as "new hires." App., *infra*, 3a.[2]

Respondents accepted Ford's offer and began work at the Twin Cities plant in January 1984. As "new hires," they were subject to a contractually-specified 90-day probationary period, during which they did not acquire any seniority as members of the bargaining unit. C.A. App. 24-25. In February 1984, prior to the expiration of their probationary period, respondents were bumped from their jobs by laid-off Ford employees who were eligible for preferential placement. App., *infra*, 3a.

As noted above, although respondents were probationary employees at the time of their dismissal, they were covered by the Ford-UAW collective bargaining agreement and had access to the grievance arbitration procedures of that agreement. Article VIII, Section 4(b) of the agreement allowed Ford to discharge or transfer an employee at any time during his probationary period, but it also provided that the Union could file a grievance contending that any such layoff or discharge was not "for cause." App., *infra*, 3a. Article VIII, Section 4(e) further provided that "probationary employes are covered by the terms of this Agreement and shall have access to the Grievance Procedure for the enforcement of their rights thereunder." C.A. App. 72.

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[2] With one exception, respondents had all previously been employed by Ford in collective bargaining unit jobs during the late 1970s and had been laid off in 1980 as part of a major reduction in force. However, respondents' seniority had expired by reason of their length of time on layoff, so they were not eligible for "preferential placement." C.A. App. 35.

The Union invoked this contractual dispute resolution procedure on respondents' behalf. On February 15, 1984, the UAW filed a grievance asserting that respondents' layoffs were improper because of certain promises allegedly made to them when they were hired. C.A. App. 31. However, the Union withdrew the grievance before it could be acted on by Ford. *Id.* at 25. Respondents did not exercise their right to obtain reinstatement of their grievance through the intra-union appeal process (see note 1, *supra*; C.A. App. 229), choosing instead to contest their dismissals by presenting virtually identical claims in litigation.

3. *The Decisions Below.* Respondents commenced this suit in Minnesota state court in April 1984. They alleged in their complaint that Ford representatives had induced them to accept employment by falsely representing that respondents were being hired as "permanent, full-time employees," that respondents "would not be laid off unless there was a slump in the economy and in truck sales," that respondents "would not be laid off due to any hiring of other former Ford employees from a preferential hiring list," and that "the preferential hiring list described in [the Ford-UAW collective bargaining agreement] had been exhausted" (C.A. App. 8-9).

Respondents charged that Ford's conduct gave rise to several state law causes of action, including breach of contract, wrongful discharge, promissory estoppel, fraud, negligence, and breach of good faith and fair dealing (C.A. App. 15-18). Respondents demanded reinstatement with back pay, fringe benefits and seniority rights under the Ford-UAW collective bargaining agreement, specific performance of their alleged pre-hire contract for permanent employment, and compensatory and punitive damages (*id.* at 18-19). After commencement of the action, respondents amended the complaint to join the Union as a party defendant "for the purpose of obtaining full and complete relief" (C.A. App. 20). Respond-

ents explained that the "Union has an interest in protecting the seniority and other contractual rights of UAW members, which rights may be affected by the outcome of this lawsuit." C.A. App. 91. See App., *infra*, 4a n.2.

Ford removed the case to the United States District Court for the District of Minnesota. C.A. App. 1-3. Thereafter, both Ford and the Union moved for summary judgment on the ground that respondents' state law causes of action were preempted by Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which makes federal law the exclusive source of rights and remedies governing relationships created by a collective bargaining agreement. See *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Relying on *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), Ford argued that all of respondents' claims were "inextricably intertwined with consideration of the terms" of the Ford-UAW collective bargaining agreement (*id.* at 213) and that "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218.[3] The district court agreed and granted the motions for summary judgment (App., *infra*, 18a-19a).

The court of appeals reversed, one judge dissenting (App., *infra*, 1a-16a). In the court of appeals' view, this case was unlike *Lueck* because "the rights and obligations [respondents] assert do not derive from the collective bargaining agreement, and * * * evaluation of

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[3] Ford and the Union also contended that respondents could not pursue their claims under federal law because of their failure to exhaust the grievance procedure, including intra-union appeals, contained in the Ford-UAW bargaining agreement (see *Clayton* v. *International Union*, 451 U.S. 679, 692 (1981)) or to allege that the Union had violated its duty of fair representation. See *Bowen* v. *United States Postal Service*, 459 U.S. 212, 221-222 (1983); *Vaca* v. *Sipes*, 386 U.S. 171, 185 (1967).

these claims will not require extensive interpretation of the terms of the labor agreement" (App., *infra*, 8a). The court held that respondents' tort claims do "not derive from nor depend upon an underlying contract" because under Minnesota law "proof of fraud does not depend on the existence of any contractual relationship" (*id.* at 8a). Similarly, respondents' contractual and quasi-contractual claims were "based on representations Ford allegedly made before the time [respondents] became employees of the company, that is, before the time they were even covered by the collective bargaining agreement" (*id.* at 9a). The court also rejected the argument that preemption was mandated by the federal policy of encouraging resolution of disputes through arbitration. It concluded—contrary to the representations of both Ford and the UAW—that respondents' claims against Ford were not within the coverage of the grievance provisions of the collective bargaining agreement (*id.* at 12a).

The court of appeals acknowledged that its decision conflicted with the Ninth Circuit's resolution of an identical preemption issue in *Bale* v. *General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986). The court below declared, however, that "we do not agree with the court in *Bale* that adjudication of these state law claims requires any significant reference to the terms of the collective bargaining agreement." App., *infra*, 11a-12a.

Judge Bright dissented. He concluded that the majority had given a "crabbed reading" to this Court's decision in *Lueck* in order to "reach[] a result completely out of step with the preemption doctrine central to federal labor law" (App., *infra*, 13a). Judge Bright explained that it was impossible to resolve respondents' state law causes of action against Ford without analyzing the terms of the contract between the company and the UAW. Thus, respondents' contract claims depended upon their rights under the collective bargaining agreement because "they

may not strike a prehire agreement for guaranteed permanent employment which conflicts with the collective bargaining agreement" (*id.* at 15a). By the same token, Judge Bright observed, "there is no way to measure the misrepresentations alleged without examining that which has been misrepresented: here, the collective bargaining agreement" (*id.* at 15a). In sum, Judge Bright concluded that preemption was required because

> [respondents] were covered by the collective bargaining agreement, had access to the grievance machinery, and, in fact, filed a grievance contesting their lay-offs which contained allegations similar to those pressed here. * * * [Respondents'] asserted rights and Ford's alleged duty arise from the collective bargaining agreement and evaluation of [respondents'] state law claims substantially depends upon interpretation of that collective bargaining agreement.

Id. at 16a.

Ford filed a petition for rehearing with suggestion for rehearing en banc, pointing out that the panel's decision clashed with *Lueck* and created a conflict among the circuits. The petition was denied with three judges dissenting (App., *infra*, 17a).

REASONS FOR GRANTING THE PETITION

For more than 30 years, this Court has consistently held that disputes between employers and employees directly relating to the terms and conditions set forth in their collectively-bargained labor contract must be governed by a uniform body of federal law, with resolution of such disputes through grievance arbitration rather than litigation. Nonetheless, the court of appeals has permitted respondents to challenge the validity of their discharge from employment—a subject addressed in detail by the Ford-UAW collective bargaining agreement—by eschewing the grievance procedures set forth in that agreement and bringing suit against their employer under state tort and contract law.

The Eighth Circuit's ruling cannot be squared with *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), or other decisions of this Court. Indeed, because the resolution of respondents' state law claims could have a direct and immediate impact on the rights of other members of the collective bargaining unit, the reasons for preemption here are far stronger than in *Lueck*. Moreover, the court of appeals' decision creates a conflict among the circuits on a frequently recurring issue of substantial public importance and adds further confusion to an area of the law that demands certainty. As we demonstrate on pages 21-27, *infra*, the Eighth Circuit's decision is at odds with fundamental principles of labor preemption recently applied by the Fifth, Sixth, Ninth, and Eleventh Circuits. Further review is plainly warranted.

A. The Court Of Appeals' Decision Conflicts With This Court's Repeated Holding That Disputes Relating To Collective Bargaining Agreements Must Be Resolved Solely Under Federal Law.

1. *Federal law and policy preempt state rules that purport to define the meaning of collective bargaining agreements.*

There is no dispute in this case that (1) respondents' complaint challenges the validity of Ford's termination of their employment, (2) at the time of their termination respondents were unionized employees subject to the collective bargaining agreement between Ford and the UAW, and (3) respondents were entitled under that agreement to contest their termination pursuant to grievance arbitration procedures. Respondents nonetheless seek to have their claims against Ford adjudicated by a court and jury under rules of Minnesota tort and contract law. In these circumstances, however, federal labor law supersedes any state law cause of action that respondents may possess. The Eighth Circuit's contrary decision cannot be reconciled with the rulings of this Court.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in any industry affecting commerce * * *." In *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957), this Court held that Section 301 is not merely a jurisdictional statute; rather, it "expresses a federal policy that federal courts should enforce these [collective bargaining] agreements" and that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 455, 456. Thus, in defining rights and responsibilities in the labor context, "[f]ederal interpretation of the federal law will govern, not state law." *Id.* at 457.

The Court elaborated on this rule in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962), which held that "[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy." *Id.* at 103. In particular, disputes about the meaning of a collective bargaining agreement cannot be left to state law because "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.'" *Ibid.* As the Court explained, "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Ibid.*

"[I]n enacting § 301," therefore, "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104.

Indeed, the "pre-emptive force of § 301 is so powerful as to displace entirely *any* state cause of action" that contends, explicitly or implicitly, that an employer breached its obligations under a labor contract. *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added). "[*A*]*ny* complaint that comes within the scope of the federal cause of action"—even though "pleaded [as] an adequate claim for relief under * * * state law" and even though seeking "a remedy available *only* under state law"—is "purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Id.* at 23-24 (first emphasis added). See *Pilot Life Ins. Co.* v. *Dedeaux*, 55 U.S.L.W. 4471, 4474-4475 (U.S. Apr. 6, 1987).

This Court recently had occasion to apply these principles in a case quite similar to the present one. In *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), an employee subject to a collective bargaining agreement brought a tort suit against his employer in Wisconsin state court, contending that the employer "intentionally, contemptuously, and repeatedly failed" to make disability insurance payments under a negotiated disability plan. *Id.* at 206. The Wisconsin Supreme Court rejected the employer's argument that federal law preempted the employee's state law cause of action, relying on essentially the same rationale adopted by the Eighth Circuit in this case. The Wisconsin court asserted that the employee's suit did not arise under Section 301 because "[u]nder Wisconsin law, the tort of bad faith is distinguishable from a bad-faith breach of contract" and "is independent of that contract." *Id.* at 207. In addition, the Wisconsin court stated that "[p]ermitting the state action to proceed would not have an adverse impact on the effective administration of national labor policy, since the courts will make no determination as to whether the labor agreement has been breached." *Id.* at 207-208.

This Court unanimously reversed. It held that the employee's state law tort suit was preempted by Section 301 because "any attempt to assess liability here inevitably will involve contract interpretation." *Lueck*, 471 U.S. at 218. The Court observed that "[i]f the policies that animate § 301 are to be given their proper range, * * * the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. As the Court explained (*id.* at 211):

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Furthermore, state law tort claims that call for interpretation of a collective bargaining agreement must be preempted because "only that result preserves the central role of arbitration in our 'system of industrial self-government.'" *Lueck*, 471 U.S. at 219, quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The Court stated that "[p]erhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement." *Lueck*, 471 U.S. at 219. Such a result—which would permit "[c]laims involving vacation or overtime pay, work assignment, *unfair discharge* [and other] disputes traditionally resolved through arbitration" to be brought in state court—"would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbi-

trator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220 (emphasis added; citation omitted).

In light of these concerns, the Court in *Lueck* announced the governing test for preemption under Section 301: a state law claim is premepted whenever it "is inextricably intertwined with consideration of the terms of the labor contract" (471 U.S. at 213), such that "any attempt to assess liability * * * inevitably will involve contract interpretation." *Id.* at 218. In other words, whenever "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

The Eighth Circuit plainly erred in holding that respendents' state law causes of action alleging "unfair discharge" (*Lueck*, 471 U.S. at 219) could be maintained notwithstanding these basic principles. As we now show, resolution of respondents' tort and contract claims unquestionably would require interpretation of numerous provisions of the Ford-UAW collective bargaining agreement. Accordingly, if respondents were permitted to challenge their layoffs under state law, it would jeopardize the strong federal interest in "interpretive uniformity and predictability" of contract terms, to be secured by resort to grievance arbitration as the exclusive means of resolving disputes. The court of appeals' "crabbed reading" of *Lueck* (App., *infra*, 13a (Bright, J., dissenting)) cannot be allowed to stand.

2. *Resolution of respondents' claims under state law would destroy the uniformity essential to interpretation of the collective bargaining agreement.*

In analyzing respondents' state law causes of action to determine whether they were preempted by federal law, the Eighth Circuit made precisely the same mistake as

the Wisconsin Supreme Court in *Lueck*. The court below focused almost exclusively on whether respondents' claims "derive from the collective bargaining agreement" (App., *infra*, 7a, 8a) or from "any contractually-established expectations of the parties" (*id.* at 8a). The question under *Lueck*, however, is not whether the plaintiff has managed to draft a complaint that appears "unrelated to an explicit provision" of the collective bargaining agreement (471 U.S. at 216), but whether resolution of the plaintiff's claims would be "substantially dependent upon analysis of the terms of [the] agreement" (*id.* at 220). If the Eighth Circuit had engaged in that inquiry, it would have concluded that all of respondents' claims—which make repeated reference to the collective bargaining agreement (see C.A. App. 91, 95, 99, 102)—are "inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213.

Respondents' contractual and quasi-contractual claims, for example, depend upon promises allegedly made by Ford concerning hiring, seniority, bumping, and termination rights. But such "individual" employment contracts could be valid only to the extent that they were not inconsistent with the Ford-UAW collective bargaining agreement. As this Court held in *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), "[t]he individual hiring contract is subsidiary to the terms of the trade agreement" and may not be used "to limit or condition the terms of the collective agreement." *Id.* at 336, 337. Upon an employee's entry into the collective bargaining unit, federal labor policy mandates that his rights become subordinated to those of the "majority of the employees" (29 U.S.C. § 159(a)) and "extinguishes the individual employee's power to order his own relations with his employer" (*NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967)). Thus, to determine whether the terms of respondents' alleged pre-hire agreements were

enforceable, a judge would necessarily be obliged to interpret the collective bargaining agreement.[4]

By the same token, Ford's defenses to respondents' contract claims depend upon construction of various provisions of the Ford-UAW agreement, including the Letters of Understanding between the company and the Union. It would be impossible to adjudicate these defenses without defining the meaning of the parol evidence provision (Art. X, § 8 (C.A. App. 74)), the probationary employee discharge provision (Art. VIII, § 4(b) (C.A. App. 71)), the February 13, 1982 Letter of Understanding establishing the preferential placement program (C.A. App. 77-

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[4] The court of appeals construed *J.I. Case* as holding that "an individual hiring agreement, *the scope of which is separate and distinct from a collective bargaining agreement*, can create legally enforceable rights and obligations." App., *infra*, 10a n.7 (emphasis added). But the pre-hire promises allegedly made to respondents involved seniority, bumping rights, job security and termination—matters intimately related to the terms and conditions of their employment and exhaustively treated by the existing Ford-UAW collective bargaining agreement. Moreover, the court below ignored the fact that the individual agreements in *J.I. Case* were in place before the collective bargaining agreement was ever negotiated. 321 U.S. at 333-334.

The court of appeals also erred in holding that respondents' "contract claims closely resemble those considered in *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983)" (App., *infra*, 10a). In *Belknap*, the employees were hired at a time when there was no collective bargaining agreement in effect and they were not covered by the agreement eventually negotiated, so there could have been no conflict between the individual contracts and the collective bargaining agreement. See 463 U.S. at 497 n.4. Here, by contrast, respondents were hired and terminated while the Ford-UAW agreement was in effect, and they knew (as former Ford employees) that they would be covered by that agreement upon rejoining the work force. See *Maushund* v. *Earl C. Smith, Inc.*, 795 F.2d 589, 592 (6th Cir. 1986); *Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359, 363-364 (5th Cir.), cert. denied, 469 U.S. 1018 (1984). In addition, respondents (unlike the *Belknap* plaintiffs) had access to the contractual grievance procedure.

78), and the limitation of liability provision in the February 13 agreement (C.A. App. 78), among others.[5]

If "state law [were] allowed to determine the meaning intended by the parties in adopting" these contract terms, "all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211. Provisions in a nationwide labor contract such as the Ford-UAW collective bargaining agreement, which covers some 110,000 employees in 20 states, might have a different meaning in Minnesota than in New York or Michigan. State contract law would be substituted for the law of the shop. This development "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103.

Equally damaging to federal law and policy would be any attempt to award respondents relief under state law. As a remedy for breach of contract, respondents' complaint demanded reinstatement, back pay and fringe benefits (both measured by respondents' rights under the collective bargaining agreement), retroactive seniority, and specific performance of Ford's alleged promises (*e.g.*, that respondents would become "permanent, full-time employees" who "would not be laid off unless there was a slump in the economy" and who "could work 10 to 20 years at Ford and could retire from Ford it they wanted to") (C.A. App. 93). Granting such relief would undermine the very foundations of the Ford-UAW agreement. It would impose duties and create special privileges utterly inconsistent with that agreement and would severely

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[5] The Letter of Understanding establishing the preferential placement program expressly states that "[t]he job security arrangements covered by this letter have potentially complex administrative implications. The Company at times may not be able to fully conform with these provisions, and accordingly, shall not be liable for back pay on any claims arising from their administration with the remedy for any violation limited to future placement opportunities for aggrieved employes." C.A. App. 78.

prejudice the rights of other members of the bargaining unit.[6] Needless to say, if a court applying state contract law were to order such relief, it would "frustrate[] the effort of Congress to stimulate the smooth functioning of [the collective bargaining] process" and would "strike[] at the very core of federal labor policy." *Lucas Flour*, 369 U.S. at 104.

Respondents' contentions fare no better when characterized as state law tort claims. As Judge Bright noted in dissent (App., *infra*, 15a), "there is no way to measure the misrepresentations alleged without examining that which has been misrepresented: here, the collective bargaining agreement." Thus, to determine whether Ford falsely portrayed the terms and conditions of employment at the Twin Cities plant, either intentionally or negligently, it would obviously be necessary to compare those representations with the terms and conditions set forth (explicitly or implicitly) in the Ford-UAW collective bargaining agreement and the Letters of Understanding. Similarly, to determine whether other allegedly false representations—such as the assertion that "the preferential hiring list * * * had been exhausted" (C.A. App. 93)—were actionable, it would obviously be necessary to construe and analyze the operation of the preferential hiring agreement to assess whether any such representations

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[6] Respondents recognized this effect on the rest of the work force by joining the Union as an indispensable party. See pages 5-6, *supra*. Union officials stressed the impact of this lawsuit on the collective bargaining agreement, stating that "[t]he case would be nearly impossible to resolve without the involvement of the Union, because it is party to the Contract, and, the joining affords the Union opportunity to defend its interests—particularly in regard to the seniority system. * * * If the Local Union is joined in this suit, we will go into court and fight for our Contractual language" (C.A. App. 223). In the district court and court of appeals, the Union filed briefs that concurred in Ford's submission that all of respondents' claims are preempted by federal labor law.

were material or could justifiably have been relied upon as a promise of permanent employment.[7]

In sum, any attempt to resolve respondents' state law causes of action without analysis of the collective bargaining agreement would be like playing Hamlet without Hamlet. A judge applying state law inevitably would be forced to define the rights and responsibilities contained in that agreement. But as the Court recently noted in *Lueck*, 471 U.S. at 211, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." Accordingly, respondents' state law challenges to the termination of their employment are preempted by federal law.

3. *Resolution of respondents' state law claims would frustrate the strong federal policy requiring settlement of labor disputes through arbitration.*

The court of appeals discounted the second reason for Section 301 preemption—protection of the grievance arbitration process—on the ground that "this policy does not require parties to submit to arbitration in a matter not covered by the collective bargaining agreement" (App., *infra*, 12a). In concluding that respondents' claims against Ford were "not within the scope of that agreement" (*ibid.*), however, the Eighth Circuit once again committed the same error as the Wisconsin Su-

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[7] Such analysis would disclose that probationary employees like respondents were, in certain circumstances, subject to being "bumped" by preferential placement candidates who joined the preferential placement list *after* the probationary employees had been hired. Thus, there was no necessary inconsistency between respondents' layoffs and any representation that there were no persons on the preferential list at the time respondents were hired, nor could respondents have justifiably relied on such a representation as implying job security.

preme Court in *Lueck*: it believed that "the only obligations the parties assumed by contract are those expressly recited in the agreement" (471 U.S. at 214). In this case, as in *Lueck*, the "assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under [the Ford-UAW] contract" to retain respondents on the job. *Id.* at 215.

Indeed, it was even less justified here than in *Lueck* to assume that the grievance underlying respondents' causes of action could not have been resolved through arbitration. First, the collective bargaining agreement on its face plainly covered respondents' discharge claims. As noted above (see page 4, *supra*), Article VIII, Section 4(b) of the agreement expressly provides that "*any* claim by a probationary employee that his layoff or discharge after 30 days of employment is not for cause * * * may be taken up as a grievance" (emphasis added). See *Lueck*, 471 U.S. at 215. It is undisputed that respondents were parties to the agreement at the time of their discharge and that they had been on the job in a probationary status for more than 30 days. Second, both of the signatories to the contract—Ford and the Union—agreed that respondents' claims were within the scope of the grievance provisions. The Union in fact filed a grievance challenging respondents' layoffs on the basis, *inter alia*, of Ford's pre-hire representations. See C.A. App. 31. Third, even if the scope of the grievance provisions were uncertain, all doubts should have been resolved *in favor of* arbitration, not against it. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583 (1960). See *AT&T Technologies, Inc.* v. *Communications Workers*, 106 S. Ct. 1415, 1419 (1986).

Thus, it was not within the court of appeals' province to conclude that respondents could not have contested

their discharges through the grievance arbitration process. In fact, if respondents had pursued their rights through the grievance procedure, and if they had been able to prove the allegations in their complaint, "[t]here is no reason to assume that the labor contract as interpreted by the arbitrator would not provide * * * relief." *Lueck*, 471 U.S. at 215. No question is more broadly committed to the discretion of an arbitrator than what constitutes "cause" for a layoff. Taking into account both the rights granted under the Ford-UAW agreement and the "industrial common law—the practices of the industry and the shop" (*Warrior & Gulf*, 363 U.S. at 581-582), the arbitrator may have concluded that respondents were wrongfully terminated (because, for example, the employees "bumping" them at the Twin Cities plant had other work available; see C.A. App. 77). Alternatively, the arbitrator may have concluded that, even if respondents' termination complied with the preferential placement program, Ford nonetheless was equitably estopped from discharging them in light of the alleged pre-hire representations.

The critical point, however, is that whatever relief the arbitrator awarded would have been fashioned with due regard for the rights and responsibilities (whether express or implied) contained in the collective bargaining agreement and with an appreciation for the interests of other affected parties, such as the Union and respondents' fellow employees. A court or jury awarding relief on respondents' state law claims, by contrast, could grant respondents the super-seniority and other benefits demanded in the complaint only by riding roughshod over the legitimate interests of the Union and its members and by creating terms and conditions of employment that were significantly different from those established for the rest of the bargaining unit. For this reason as well, preemption of respondents' state law causes of action is the only "result [that] preserves the central role of arbitration in our 'system of industrial self-govern-

ment.'" *Lueck*, 471 U.S. at 219, quoting *Warrior & Gulf*, 363 U.S. at 581. See *Bowen* v. *United States Postal Service*, 459 U.S. 212, 225 (1983).

In the last analysis, the issue here, as in other labor preemption cases, is not whether respondents may object to their terminations, but in what forum they may object and under what substantive law and procedures. This Court has already answered that question: "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104. The decision below is "completely out of step with [this] doctrine" (App., *infra*, 13a (Bright, J., dissenting)) and threatens to subvert "the congressional goal of a unified federal body of labor-contract law" (*Lueck*, 471 U.S. at 220).

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Several Other Circuits.

The disagreement between the majority and the dissenting judges in the Eighth Circuit mirrors the conflict among the courts of appeals. The circuits are hopelessly divided as to the scope of Section 301 preemption and the proper application of the test announced in *Lueck* in the context of "extra-contractual" representations relating to the terms and conditions of employment.

The Third Circuit agrees with the Eighth that a unionized employee may bypass his remedies under the collective bargaining agreement and sue his employer under state tort or contract law if the state cause of action is deemed to be "independent" of the agreement. In *Malia* v. *RCA Corp.*, 794 F.2d 909 (3d Cir. 1986), petition for cert. filed, No. 86-990 (Dec. 15, 1986), an employee brought suit against his employer for breach of contract and misrepresentation, alleging that the employer had fraudulently induced him to leave his bargaining unit position and accept a supervisory job. The Third Circuit held that the employee's state claims were

not preempted, because his "[c]omplaint also alleges facts that would support a claim for breach of an oral contract," "[t]his oral contract is a completely separate agreement from the collective bargaining agreement," and the "tort claims, which derive from the breach of the oral contract, are independent of and do not interfere with the * * * collective bargaining agreement" (794 F.2d at 912, 913). Judge Becker dissented, pointing out that an employee "cannot enforce an oral contract concerning reinstatement because that area of employment relations has been preempted by the collective bargaining agreement" (*id.* at 915 n.2) and that "any close question about the scope of the coverage of the * * * agreement should be resolved in favor of a broad reading because strong federal policy interests support such coverage." *Id.* at 914.

On the other hand, the Fifth, Sixth, Ninth and Eleventh Circuits have rejected this grudging interpretation of *Lueck* and have held that claims virtually identical to respondents' claims were preempted by Section 301. In *Bale* v. *General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986), two employees, like the respondents in this case, contended that they were improperly discharged as probationary employees because the company had made pre-hire promises of permanent employment. Like respondents, they brought suit alleging state law causes of action for breach of an oral contract, fraud, and negligent misrepresentation. The Ninth Circuit determined that each of these claims was preempted.

The Ninth Circuit concluded that the employees could not pursue their contract claim because, at the time of their discharge, they

> were members of the bargaining unit covered by the collective agreement between General Telephone and Local 11510. The individual employment contracts entered into by [the employees] could therefore be effective only insofar as they were consistent with the collective agreement. Any suit for breach of the

> individual employment contracts would therefore fall within the preemptive scope of section 301.

795 F.2d at 779 (citation omitted). Similarly, the Ninth Circuit held that the employees' tort claims must fail as a matter of law because

> adjudication of [these] claims would require reference to, and interpretation of, the terms of the collective bargaining agreement. In order to prove their fraud and negligent misrepresentation claims, [the employees] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

795 F.2d at 780 (quoting *Lueck*, 471 U.S. at 220).

Thus, the Ninth Circuit in *Bale* rejected precisely the same arguments accepted by the court below. See page 7, *supra*. The Eighth Circuit, but not the Ninth, was willing to view the employees' state law claims as "completely separate from and independent of a collective bargaining agreement" (App., *infra*, 11a; compare 795 F.2d at 779) and to allow those claims to be adjudicated on the assumption that it would "not require *extensive* interpretation of the terms of the labor agreement" (App., *infra*, 8a (emphasis added); compare 795 F.2d at 780). See also *Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1470 (9th Cir. 1984) (holding that tort and contract claims contesting a termination were preempted even though the employee's "complaint was carefully worded to avoid any direct reference to the collective bargaining agreement that controlled his employment").

The Eighth Circuit's position is also at odds with the rule in the Eleventh Circuit. In *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. de-

nied, 106 S. Ct. 863 (1986), unionized employees brought state law breach of contract and fraud claims to challenge their layoffs. The employees alleged that they had been induced to stay on the job, rather than obtain employment elsewhere, by their employer's false representations that they would have a job with the company until retirement age. Like respondents here, the employees in *Mason* argued that their state law claims were "separate and independent from the collective bargaining agreement" (763 F.2d at 1222), and they expressly disclaimed any reliance on the agreement (*id.* at 1223). The Eleventh Circuit was unpersuaded:

> On analysis, * * * the [employees'] claim is for termination of employment, wrongful because the employer had represented the employment would continue. Wrongful termination of employment is grist for the arbitration mill in collective bargaining agreements. Simply characterizing the claim as a tort claim rather than a breach of contract claim is insufficient to take it out of the policy that such disputes are subject to arbitration.

763 F.2d at 1224. See also *Redmond* v. *Dresser Industries, Inc.*, 734 F.2d 633 (11th Cir. 1984) (refusing to allow an employee covered by a collective bargaining agreement to challenge his layoff by bringing breach of contract, fraud, and other state law tort claims against his employer, despite allegations that the employer had misrepresented the terms of employment).[8]

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[8] The Eleventh Circuit recently reached a somewhat contradictory result in *Varnum* v. *Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986). In that case, the employee alleged that he was induced to accept employment on the basis of representations concerning the collective bargaining agreement that, while true when made, were inconsistent with a new agreement the employer was about to propose to the union. In a short and cryptic discussion that does not cite, much less discuss, *Lueck*, *Mason*, or *Redmond*, the Eleventh Circuit held that the employee's fraud complaint was not preempted by Section 301 because it "did not go to a term of employment covered by the collective bargaining agreement. Instead, the

The Sixth Circuit also has disagreed with the Eighth Circuit's interpretation of Section 301 preemption. In *Martin* v. *Associated Truck Lines, Inc.*, 801 F.2d 246 (6th Cir. 1986), employees who incurred financial hardship in transferring from one company plant to another contended that they had relocated in reliance on false representations by their union and employer concerning seniority and termination rights. The Sixth Circuit held that the employees' state law tort claims were preempted because

> an evaluation of the misrepresentation claim alleged would require consideration of the terms of the collective bargaining agreement—particularly Article 8, Section 6 of the Agreement which deals specifically with changes of operations. Since [the employees'] misrepresentation claims are intertwined with the terms of the collective bargaining agreement, they are preempted by § 301.

801 F.2d at 249. Again, this analysis cannot be reconciled with the Eighth Circuit's decision allowing respondents' state law claims to proceed. See also *Maushund* v. *Earl C. Smith, Inc.*, 795 F.2d 589 (6th Cir. 1986).

Finally, the Eighth Circuit's ruling conflicts with the Fifth Circuit's decision in *Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), cert. denied, 469 U.S. 1018 (1984). There, a discharged employee filed suit claiming breach of an individual contract of employment with his employer arising from pre-hire representations concerning job retention in the event of disability. The Fifth Circuit acknowledged that the employee's claim "on its face, does not invoke the collec-

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complaint involved Nu-Car's conduct prior to [the employee's] accepting employment." 804 F.2d at 640.

As one lower court has recently observed, *Varnum* is difficult to square with the precedents of this Court and the Eleventh Circuit. See *Darden* v. *United States Steel Corp.*, 124 L.R.R.M. 2688 (N.D. Ala. 1987).

tive bargaining agreement" (*id.* at 362) and involved "a dispute with regard to company practices, policies, or customs that are not explicitly covered by the collective bargaining agreement" (*id.* at 363). Nonetheless, the Fifth Circuit held that the claim was preempted by Section 301 because the oral pre-hire contract could not be construed without reference to the collective bargaining agreement. *Id.* at 362, citing *J.I. Case*, 321 U.S. at 337. Moreover, the court noted that "[t]o the extent that [the employee's] assertion invokes the 'industrial common law' of NOPSI's employment practices, * * * such practices are part and parcel of the collective bargaining agreement and subject to its terms, including the grievance procedure." *Id.* at 363.

The decisions summarized above, and many other recent decisions,[9] have taken *Lueck* at its word and have refused to allow employees to assert state law claims, even if drafted to appear "completely separate and independent of [the] collective bargaining agreement" (App., *infra*, 11a), if the employees' "attempt to assess liability * * * inevitably [would] involve contract interpretation" (*Lueck*, 471 U.S. at 218). These courts have given effect to the strong federal policies requiring uniformity of construction of labor contracts and channeling employment disputes through arbitration. By adopting a wholly different rationale, the court below "has unnecessarily created a conflict in the circuits." *Id.* at 15a (Bright, J., dissenting).

It is essential that this Court resolve the conflict. Disagreements between employers and employees are com-

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[9] See, *e.g.*, *Desoto* v. *Yellow Freight Systems, Inc.*, 811 F.2d 1333, 1335 (9th Cir. 1987); *Kirby* v. *Allegheny Beverage Corp.*, 811 F.2d 253, 255-256 (4th Cir. 1987); *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1288 (6th Cir. 1986); *Truex* v. *Garrett Freightlines, Inc.*, 784 F.2d 1347, 1350 (9th Cir. 1985); *Mitchell* v. *Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345-346 (7th Cir. 1985), cert. denied, 106 S. Ct. 1266 (1986).

monplace, particularly in the context of discharges and layoffs, and it would be the rare employee who could not package his complaint as an "independent" state cause of action by recalling pre-hire statements seemingly at odds with his subsequent termination. As a result, these state law tort and contract suits will continue to proliferate until this Court clarifies the governing principles. Nothing could be more destructive of the goals Congress sought to achieve in enacting Section 301 than a rule facilitating attempts by individual employees to make end runs around the collective bargaining and contractual dispute resolution process. Unfortunately, the Eighth Circuit's decision—which disregards the "extraordinary preemptive power" of Section 301 (*Metropolitan Life Ins. Co.* v. *Taylor*, 55 U.S.L.W. 4468, 4470 (U.S. Apr. 6, 1987)—offers just such a blueprint for evasion of the congressional scheme.

C. The *Hechler* And *Caterpillar* Cases May Shed Further Light On The Correctness Of The Court Of Appeals' Decision.

The importance of the question presented here is further evidenced by the presence of two cases on the Court's docket that bear directly on the correctness of the Eighth Circuit's decision. The Court has granted certiorari in *IBEW* v. *Hechler*, No. 85-1360, and *Caterpillar, Inc.* v. *Williams*, No. 86-526, to consider whether state law claims are preempted by Section 301.

Hechler is a state law tort suit brought by an employee complaining that her union breached a duty to ensure that she was provided a safe work place. The union argues that any such duty could have arisen only pursuant to the collective bargaining agreement and thus, under *Lueck*, "questions of contract interpretation * * * underlie any finding of tort liability." 471 U.S. at 218. *Caterpillar* is a state breach of contract suit brought by employees protesting that their layoffs violated written and oral representations made to them both before and after they joined the collective bargaining unit. The com-

pany argues that "[any] such [individual] agreements * * * may [not] survive or surmount collective ones" (*J.I. Case*, 321 U.S. at 338) and that the employees' claims therefore must be viewed as arising under the collective bargaining agreement.[10]

In each of these cases, the employees contend that their state law causes of action exist independently of the collective bargaining agreement and would not require analysis of that agreement. Accordingly, the Court's application of the test enunciated in *Lueck* to these state law claims will shed further light on Section 301 preemption standards and undoubtedly will require further consideration of the Eighth Circuit's dubious preemption ruling in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1987

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[10] The Court might not have occasion to reach the preemption issue in *Caterpillar*, because that case is complicated by a threshold question of removal jurisdiction. This case, by contrast, contains no such impediment because it was removed to federal court on the basis of both diversity of citizenship and federal subject matter. See C.A. App. 1-3.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5370

KATHY ANDERSEN, SUE BYDZOVSKY, MIKE DISANTO, JIM DONALDSON, RANDY A. ENGEL, JANET FROST, CAROLYN GILLISPIE, DENISE GOMEZ, NANCY HAIDER, TOMMY HAINES, DEAN HEDBERG, CLYDE HUGHES, ANN LABELLE, SCOTT MAKI, DAN MATYKIEWICZ,

Appellants,

ROBIN MCCLOSKEY,
JEFF MCFARLAND, LIZ MCFARLAND, JEAN MCNALLY, KEN MCNAMARA, AUDRY MOEN, JANET MURPHY,

Appellants,

STEPHEN NELSON,
LORNA OLSEN, MARK OLSEN, TERRY PENDERSEN, BESSIE POOLE, BARBARA PRATT, TONY QUEVEDO, D.J. RIERSON, TERRI SAVAGE, BETTY SIMMS, JEFFREY SORENSON,

Appellants,

DENNIS STORDAH,
KEITH W. SWAN, TOM SYPNIESKI,

Appellants,

BRUCE GRIFFITH,
JAMES KOSHENINA, JAMES WENZEL,
SANDRA MOSHIER,

Appellants,

v.

FORD MOTOR COMPANY,
UNITED AUTO WORKERS INTERNATIONAL UNION,

Appellees.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 14, 1986
Filed: October 23, 1986

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, Circuit Judge.

McMILLIAN, Circuit Judge.

Appellants seek review of a final order entered in the District Court for the District of Minnesota dismissing their state law claims against Ford Motor Company (Ford) and the United Auto Workers International Union (UAW or union) as preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (§ 301).[1] For reversal appellants argue the district court erred in dismissing their state law claims because (1) the source of the rights they assert is independent of the collective bargaining agreement between Ford and the UAW and adjudication of their state law claims would not require an interpretation of the terms of that agreement, and (2) preemption is inappropriate because the application of state law in this case would not interfere with the federal scheme favoring collective bargaining. For the reasons discussed below, we reverse the judgment of the district court and remand for further proceedings.

During the summer of 1983, Ford scheduled a production increase to begin in December 1983 at its Twin Cities assembly plant located in St. Paul, Minnesota. To

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[1] The district court did not explain the basis of its order to dismiss. Federal preemption, however, is the only basis that would have led to dismissal of appellants' entire lawsuit.

meet the labor demands of the projected increase, Ford needed to hire approximately 250 additional production employees at the plant. By agreement with the UAW, Ford was required to offer these available jobs to company employees on a preferential hiring list. This list consisted of the names of laid-off Ford employees throughout the country whose plants had either been shut down or who were on indefinite layoff. Ford began to offer employment at the Twin Cities plant to preferentially placed applicants in October 1983. Ford also contacted appellants and offered them employment. Appellants were former Ford employees who had been laid off during 1980, but whose recall rights had expired due to the length of time they had been on layoff. Appellants were employed as new hires under the collective bargaining agreement between Ford and the UAW and were subject to a 90-day probationary period. Before the end of the probationary period, in February 1984, appellants were "bumped" from their jobs by employees from the preferential hiring list.

Appellants brought this action in state court alleging, *inter alia*, state law claims of fraud, breach of a verbal contract of employment, breach of the covenant of good faith and fair dealing, wrongful discharge, promissory estoppel, and negligence. There was no allegation that Ford had violated the collective bargaining agreement. According to the complaint, Ford represented to appellants when they were hired that they were being taken on as permanent employees of the company. As former Ford employees, appellants were familiar with the preferential hiring list and they claim that they sought and received repeated assurances from Ford that they would not be "bumped" by preferential hirees. Appellants contend Ford told them that the preferential hiring list had been exhausted, that they would not be replaced by preferential hirees, and that they would be laid off only if there was an economic downturn. Appellants allege that

Ford reiterated these assurances during the new hire orientation. Appellants speculate that Ford was not able to meet its hiring needs for the proposed production increase in sufficient time through the preferential hiring list, and therefore hired appellants to fill the short term work requirement until replacement employees from the preferential list could be hired.

Appellants sought relief in the form of reinstatement, backpay, accrued benefits, specific performance of the contract for permanent employment, consequential damages, damages for emotional distress, and punitive damages. After commencement of the action, appellants joined the UAW as a defendant for the purpose of obtaining a complete remedy pursuant to Fed. R. Civ. P. 19.[2] Ford had the case removed to the federal district court.[3]

Ford and the UAW moved for summary judgment on two occasions based upon federal preemption. The district court denied the first motion. Appellants then voluntarily withdrew the wrongful discharge claim. In their second motion for summary judgment, Ford and the UAW argued that appellants' state law claims were preempted by federal labor law and by failure to exhaust the grievance procedure contained in the collective bargaining agreement between Ford and the union. The district court granted the motion and this appeal followed.

The sole issue before us in this appeal is whether appellants' state law claims are preempted by federal

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[2] Appellants have no claim against the UAW, but because their request for reinstatement would affect the plant seniority system, the UAW was joined to protect the interest of those union members whose seniority and employment may be affected.

[3] The basis for federal jurisdiction was diversity jurisdiction. Ford also alleged federal question jurisdiction, which appellants do not concede.

labor law.[4] Where federal and state law conflict in the area of labor relations, or where local regulation would frustrate the federal labor law scheme, federal law preempts state law. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). Federal labor policy favors collective bargaining between labor and management. Uniformity in the interpretation of collective bargaining agreements is considered essential to the federal scheme favoring collective bargaining. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Such uniformity is assured by application of the preemption doctrine under § 301.[5] "Substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." *Id.* Thus, if state law purports to define the meaning of the contract relationship under a collective bargaining agreement, state law will be preempted in deference to § 301. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1912 (1985) (*Lueck*). Conversely, however, state rules that proscribe conduct or establish rights and obligations independent of a labor contract are outside the preemptive scope of § 301. *Id.* It is against this background that we consider appellants' contentions.

The parties agree, and we concur, that the controlling authority on the issue of preemption in this case is *Lueck*.

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[4] The parties agree the primary issue in this appeal is federal preemption and have limited briefing accordingly, reserving other issues pending resolution of the federal law issue.

[5] Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined [by the Act], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

In *Lueck*, the United States Supreme Court set out the standard for determining when § 301 preempts a plaintiff's state law claim. The Court held that when resolution of a state law claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," preemption is required. *Id.* at 1916. Among the factors relevant to the determination of whether a state law claim meets the "substantially dependent" standard is whether the claim derives from or is implied from contract rights established under a collective bargaining agreement, and whether evaluation of the claim is "inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 1912.

In *Lueck*, an employee covered by a collective bargaining agreement that granted disability insurance benefits and established specific procedures for processing disability claims brought a tort claim in Wisconsin state court alleging his employer had handled his disability insurance claim in bad faith. *Id.* at 1907-08. To determine if the employee's claim was preempted by § 301, the Court analyzed the nature of the Wisconsin tort rule prohibiting bad faith handling of insurance claims. The Court first found that under Wisconsin common law, no employer is obligated to provide disability insurance benefits to its employees. The source of that obligation, and of Lueck's corresponding right to these benefits, was the collective bargaining agreement. *Id.* at 1914-15. Next, the Court noted that, under Wisconsin law, the obligation to handle claims for insurance benefits in good faith was a duty implied from the insurance contract between the parties. In Lueck's case, the insurance contract was the collective bargaining agreement. *Id.* at 1914. Finally, the Court found that the standard for determining whether the employer had violated the common law duty to handle claims in good faith would be derived in part from the procedures for handling claims established by the terms of the collective bargaining agreement. The

definition of "good faith" required for evaluation of the state tort claim would thus depend on the understanding of the parties concerning the meaning of the collective bargaining agreement. *Id.* at 1914-15.

The Court concluded that the actual source of the rights and obligations Lueck sought to enforce was the collective bargaining agreement and not state law. *Id.* at 1914. Further, the Court found that evaluation of Lueck's state tort claim was "tightly bound with questions of contract interpretation" regarding the collective bargaining agreement. *Id.* Hence, the Court concluded, Lueck's state law claim must be left to federal law under § 301. *Id.*

In the present case, appellants argue that their state law claims do not derive from the collective bargaining agreement between Ford and the UAW, but originate solely in Minnesota common law. Further, they contend, resolution of their state law claims would not require interpretation of the terms of the collective bargaining agreement. They urge, therefore, that their case can be distinguished from *Lueck*. Ford and the UAW counter that resolution of appellants' employment-related claims would require extensive analysis of the terms of both the preferential hiring and collective bargaining agreements. Further, Ford and the UAW insist that the proper avenue for resolution of appellants' claims is through the grievance procedure in the collective bargaining agreement, and they argue that federal labor policy favoring resolution of labor disputes by arbitration and grievance procedures would be frustrated if these state law claims are not preempted.

We agree with appellants that the facts of the present case mandate a different result on the issue of preemption than that reached in *Lueck*. We find support for making this distinction in *Lueck*; there, the Supreme Court directed that the determination of whether preemption is required must be made on a case-by-case basis.

Id. at 1911. The Court further emphasized that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." *Id.* A careful consideration of appellants' claims demonstrates that the rights and obligations they assert do not derive from the collective bargaining agreement, and that evaluation of these claims will not require extensive interpretation of the terms of the labor agreement.

We consider first appellants' state law claim of fraudulent misrepresentation. Fraud is a common law tort action deeply rooted in local standards of individual and social responsibility. *See generally* W. Prosser & W.P. Keeton, Prosser and Keeton on Torts § 105 (5th ed. 1984). Unlike the tort claim for bad faith handling of an insurance claim considered in *Lueck*, a claim of fraud does not derive from nor depend upon an underlying contract. Under Minnesota law, proof of fraud does not depend on the existence of any contractual relationship, nor do the standards for judging fraudulent misconduct derive from any contractually-established expectations of the parties. *See Davis v. Re-Trac Manufacturing Corp.*, 276 Minn. 116, 117, 149 N.W.2d 37, 38-39 (1967), *citing Hanson v. Ford Motor Co.*, 278 F.2d 586, 591 (8th Cir. 1960) (elements of cause of action for fraud under Minnesota law).

A plaintiff may not, of course, avoid preemption simply by relabeling as "fraud" a claim that is, in essence, a claim for violation of a collective bargaining agreement. *Lueck*, 105 S. Ct. at 1911. Such was the case in *Bell v. Gas Service Co.*, 778 F.2d 512 (8th Cir. 1985) (*Bell*). In *Bell*, a discharged employee brought a state law claim alleging fraudulent misrepresentation against her former employer. She claimed the employer fraudulently induced her to accept a promotion to a position for which she was not qualified. She also claimed she was wrongfully discharged from this new position rather than demoted, as

was provided for in the collective bargaining agreement under which she worked at all relevant times. *Id.* at 513-14, 517. In examining the substance of Bell's fraud claim, we determined that the claim turned on a dispute over contractually-established job procedures. Bell's claim, we concluded, "[arose] from contract rights" and we therefore held that preemption was appropriate. *Id.* at 517-18.[6] *Cf. Hillard v. Dobelman*, 774 F.2d 886 (8th Cir. 1985) (ex-employee's claim of tortious interference of contract preempted under *Lueck*).

We next consider appellants' contractual and quasi-contractual claims. We find it significant that these claims are based on representations Ford allegedly made before the time appellants became employees of the company, that is, before the time they were even covered by the collective bargaining agreement. Appellants are seeking to establish hiring contracts created by Ford's alleged offers of permanent-status employment separate from the collective bargaining agreement.[7] It is clear

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[6] This court also decided in favor of preemption in *Moore v. General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984) (*Moore*), *cert. denied*, 105 S. Ct. 2320 (1985). Moore, an employee of General Motors on lay-off status, brought a state law claim against the company alleging fraudulent misrepresentation. Moore alleged the company offered her work at a plant in another state if she would transfer, a right provided her under the General Motors collective bargaining agreement. When she arrived at the new plant, however, no job was available. *Id.* at 313-14. In *Moore*, it was clear that the state law claim at issue was inextricably intertwined with the collective bargaining agreement. General Motors was obligated to offer Moore the transfer because of the agreement and the procedures governing her transfer were part of the terms of that contract. Moore's cause of action, therefore, was not independent of the collective bargaining agreement, but was "substantially dependent" on its terms. Ford's reliance on *Moore* in its argument for preemption in the present case is misplaced.

[7] Ford and the UAW contend that the United States Supreme Court's decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (*Case*), prohibits such pre-employment hiring agreements. This

that appellants' contractual and quasi-contractual claims do not originate in, nor refer in any substantial way to, the rights and duties established in the collective bargaining agreement.

Appellants' contract claims closely resemble those considered in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (*Belknap*). In *Belknap*, an employer offered permanent work to strike-breakers and then entered into a settlement with the union that called for replacement of the strike-breakers by striking employees. *Id.* at 493-97. The Supreme Court allowed the strike-breakers to bring state law claims of misrepresentation and breach of contract to enforce the promise of permanent-status employment notwithstanding the employer's claim that such state law causes of action were preempted by federal labor law. *Id.* at 500. The Court acknowledged that the employer had the right under federal labor law to hire permanent replacements for striking employees, but wrote, "it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued." *Id.* By the same token, we do not think that because Ford had the right to displace appellants under the terms of the collective bargaining agreement, the company also had the right to either misrepresent to appellants the terms and conditions of employment or to avoid contractual or quasi-contractual obligations based on pre-employment promises.

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misstates the holding of *Case*. Under *Case*, Ford could not, in an effort to avoid the collective bargaining agreement, enter into individual contracts with appellants setting out the terms and conditions of employment. The collective bargaining agreement supersedes individual employment contracts. *Id.* at 336, 339. Nonetheless, the Supreme Court recognized in *Case* that an individual hiring agreement, the scope of which is separate and distinct from a collective bargaining agreement, can create legally enforceable rights and obligations. *Id.*

Faced with facts somewhat like those before us today, *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986) (*Bale*), the Ninth Circuit reached a different result on the issue of preemption. In *Bale*, state law claims of fraud, negligent misrepresentation and breach of contract were brought by discharged employees against their former employer after they were "bumped" from their jobs to make room for employees on a preferential hiring list created by a collective bargaining agreement.[8] Plaintiffs' state law claims arose from alleged pre-employment promises and representations regarding the permanency of employment. In holding the state law claims preempted as "substantially dependent" on the collective bargaining agreement, the *Bale* court reasoned that:

> adjudication of [plaintiffs'] state tort claims would require reference to, and interpretation of, the terms of the collective bargaining agreement. In order to prove their fraud and negligent misrepresentation claims, [plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made.

Id. at 780. Our analysis above of the source of the torts of fraud and negligent misrepresentation satisfies us that these claims arise in state common law and are measured by standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement. Thus we do not agree with the

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[8] A significant fact distinguishing *Bale v. General Tel. Co.*, 795 F.2d 775 (9th Cir. 1986) (*Bale*), from the present case is that the plaintiffs in *Bale* also brought a § 301 claim concurrent with their state law claims. The court in *Bale* relied in part on this concurrent federal claim to hold the state law claims preempted, stating "[plaintiffs'] state tort claims are preempted by section 301 since they 'arose out of the same acts and conduct which formed the basis of' their section 301 claims." *Id.* at 780 (citation omitted).

court in *Bale* that adjudication of these state law claims requires any significant reference to the terms of the collective bargaining agreement. Our analysis is supported by *Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir. 1986), where it was held that an employee's state law tort claims, which arose from alleged representations by his employer that he could elect to return to his former position if he was not satisfied with a promotion, were not dependent on and did not interfere with a collective bargaining agreement. *Id.* at 913. Thus, the claims were held not preempted by § 301 under the *Lueck* standard. *Id.*

Ford and the UAW finally argue that preemption of appellants' state law claims is mandated by federal labor policy favoring settlement of labor disputes through grievance procedures and arbitration. In *Lueck*, the Supreme Court stated that the necessity "to preserve the central role of arbitration" was among the reasons for preemption of a state law tort claim. 105 S. Ct. at 1915. While we agree that federal labor policy favors resolution of disputes among parties to collective bargaining agreements through contractual grievance procedures or arbitration, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960), this policy does not require parties to submit to arbitration in a matter not covered by the collective bargaining agreement. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Morello v. Federal Barge Lines, Inc.*, 746 F.2d 1347, 1350 (8th Cir. 1984). Appellants seek to hold Ford liable for actions that allegedly occurred before the time when appellants were parties to the collective bargaining agreement and we have concluded their claims against the company based on these actions are not within the scope of that agreement. Given these facts, appellants cannot be compelled to use the contract grievance procedure to settle their dispute with Ford.

In summary, we find appellants' state law claims are not "substantially dependent" upon the collective bargaining agreement between Ford and the UAW and that appellants' claims against Ford are not subject to the grievance procedures of that agreement. For these reasons, we conclude the district court erred in dismissing appellants' state law claims as preempted by § 301. We reverse the judgment of the district court and order the cause remanded for further proceedings.

Reversed and remanded for further proceedings.

BRIGHT, Senior Circuit Judge, dissenting.

The majority gives *Allis-Chalmers Corp. v. Lueck*, 105 S.Ct. 1904 (1985), a crabbed reading. It nakedly accepts appellants' allegations that their disputes with Ford are separate from the collective bargaining agreement notwithstanding that it is impossible to find fraud without examining Ford's obligations under the collective bargaining agreement. Thus, the majority reaches a result completely out of step with the preemption doctrine central to federal labor law. I, therefore, dissent.

As in *Lueck*, our analysis must focus on whether appellants' state law claims for fraudulent misrepresentation and breach of contract confer "non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the * * * claim[s] is inextricably intertwined with consideration of the terms of the labor contract. If the state * * * law purports to define the meaning of the contract relationship, that law is preempted." *Id.* at 1912. Contrary to the majority's opinion, resolution of appellants' claims substantially depends upon analysis of the collective bargaining agreement, and therefore section 301 of the LMRA preempts their claims.

It is undisputed that, upon hire, appellants became members of the collective bargaining unit covered by the

labor contract. Furthermore, Ford had a contractual obligation to offer available jobs at the St. Paul plant to company employees on the preferential hiring list. This interplant job opportunity program rests upon the seniority provisions of the basic labor contract. After hiring appellants, Ford became obligated to comply with the contractual provision requiring it to recall employees on the preferential hiring list who possessed existing seniority, which appellants did not possess. Thus in discharging appellants, Ford claims it merely relied on its agreement with the Union as it was obliged to do.

This court must now decide whether appellants' claims, characterized as state contract and tort claims, are preempted by federal labor law in light of Ford's obvious defense that its conduct complied with a valid labor contract. In *Lueck*, the Supreme Court recognized the potential for this contract-tort "characterization game" [1] observing that because "nearly any alleged willful breach of contract can be restated as a tort claim * * * the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims." *Lueck*, 105 S.Ct. at 1915.

The majority concludes that the rights and obligations appellants assert do not derive from the collective bargaining agreement. Rather, appellants' claims arise from prehire agreements with Ford which are separate from and independent of the collective bargaining agreement. This suggests that by virtue of the alleged pre-employment agreements with Ford, appellants acquired an employment status different from that of Ford employees who, unlike appellants, retained their seniority rights. Under this analysis, employees in the position of appellants might also sue Ford for breach of these prehire

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[1] For a discussion of these characterizations in tort actions brought by unionized employees *see* FitzGibbon Kinyon & Rohlik, "Deflouring Lucas Through Labored Characterizations: Tort Actions of Unionized Employees," 30 St. Louis U.L.J. 1, 23 (1985).

agreements, if appellants had served their probationary period, achieved permanent status, and had then been laid off according to their seniority under the collective bargaining agreement. This would turn the preemption doctrine on its head.

However, the Supreme Court has ruled that the collective bargaining agreement supersedes individual employment contracts. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Individual employment contracts may not be used to limit or condition the terms of the labor contracts. *Id.* at 336-39. Thus, just as Ford and appellants are not free to make individual agreements that appellants will work for a rate of pay less than that guaranteed by the labor contract, they may not strike a prehire agreement for guaranteed permanent employment which conflicts with the collective bargaining agreement.

Further, the majority, by dismissing the Ninth Circuit's analysis in *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986), has unnecessarily created a conflict in the circuits. It attempts to distinguish *Bale* by the fact that the plaintiffs in *Bale* brought a section 301 claim concurrent with their state law claims. This is "a distinction without a difference" for appellants here have expressly waived the section 301 claims they had.

In this case, as in *Bale*, there is no way to measure the misrepresentations alleged without examining that which has been misrepresented; here, the collective bargaining agreement. The majority ignores the various contentions of Ford that the alleged misrepresentations were not quoted in full or accurately or were taken out of context. There is simply no way around the inextricable meshing of the collective bargaining agreement and appellants' claims.

In addition, appellants' claims are not analogous to those asserted in *Belknap v. Hale*, 463 U.S. 491 (1983), as contended by the majority. In *Belknap*, the Supreme

Court recognized the right of strikebreakers to bring a state cause of action for breach of contract against their employer in part because the strikebreakers were not covered by the collective bargaining agreement and therefore had no remedy in the grievance machinery of the labor contract. *See id.* at 507. Here, appellants were covered by the collective bargaining agreement, had access to the grievance machinery, and, in fact, filed a grievance contesting their layoffs which contained allegations similar to those pressed here.

This court has previously recognized that "application of federal preemption cannot be avoided by attempts to allege only state contract or tort theories * * *." *Moore v. General Motors Corp.*, 739 F.2d 311, 317 (8th Cir. 1984). Here, appellants' asserted rights and Ford's alleged duty arise from the collective bargaining agreement and evaluation of appellants' state law claims substantially depends upon interpretation of that collective bargaining agreement. *Lueck*, 105 S.Ct. at 1914-15. Accordingly, I believe the district court acted correctly in applying the doctrine of preemption as a basis for dismissing the action by these Ford employees.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5370-MN

KATHY ANDERSEN, *et al.*,
Appellants,

vs.

FORD MOTOR COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court
for the District of Minnesota

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Judges Heaney, Gibson and Magill would have granted the petition.

Judge Fagg did not participate.

Petition for rehearing by the panel is also denied.

January 22, 1987

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. 3-84-584

KATHY ANDERSEN, *et al.*,
Plaintiffs,

v.

FORD MOTOR COMPANY and UNITED AUTO WORKERS (UAW) INTERNATIONAL UNION,
Defendants.

ORDER

This case was before the court on September 16, 1985 for hearing on defendants' motions for summary judgment pursuant to Rule 56(b), Fed. R. Civ. P.

Macpherson and Fellman, Minneapolis, Minnesota by Roderick J. Macpherson, III, Esq. appeared on behalf of plaintiffs. Dorsey and Whitney, Minneapolis, Minnesota by Robert L. Hobbins, Esq. appeared on behalf of defendant Ford Motor Company. Michael B. Nicholson, Esq., Detroit, Michigan, appeared on behalf of defendant International Union, United Auto Workers.

The Company and the Union submitted separate motions seeking summary judgment, and each joined in the motion of the other. The court, having considered all of the files, records, affidavits, and proceedings, having reviewed the memoranda of points and authorities submitted by the parties, having heard the arguments of counsel, and having found that there is no genuine issue

as to any material fact and that the defendants are entitled to judgment as a matter of law, orders that

Defendants' motions for summary judgment are granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 19, 1985.

/s/ Edward J. Devitt
EDWARD J. DEVITT
United States District Judge

APPENDIX D

RULE 28.1 STATEMENT

The following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner Ford Motor Company:

Subsidiaries:

Anhanguera Leasing S.A.—Arrendamento Mercantil
Bongotti S.A. Industria e Comercio de Radiadores
Consorcio Nacional Ford Ltda.
Distribuidora Ford de Titulos e Valores Mobiliarios Ltda.
Eik & Hausken A/S
Escorts Tractors Limited
Eveleth Taconite Company
Excel Industries
1st Nationwide Network, Inc.
Ford Administracao e Consorcios Ltda.
Ford Brasil S.A.
Ford Credit A.B.
Ford Credit A/S
Ford Credit B.V.
Ford Credit Bank Aktiengesellschaft
Ford Credit N.V.
Ford Credit S.A.
Ford Distribuidora de Produtos de Petroleo Ltda.
Ford Financiadora S.A. Credito, Financiamento e Inv.
Ford Investitions-GmbH
Ford Investitions GmbH & Co. oHG
Ford Lio Ho Motor Company Ltd.
Ford Motor Company Aktiebolag
Ford Motor Company A/S
Ford Motor Company (Austria) K.G.
Ford Motor Company (Belgium) N.V.
Ford Motor Company of Australia Limited

Ford Motor Company of Canada, Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private Limited
Ford Motor Company (Switzerland) S.A.
Ford Motor Credit Company of New Zealand Limited
Ford Motor Norge A/S
Ford Nederlands N.V.
Ford Overseas Finance N.V.
Ford Sales Company of Australia Limited
Ford Versicherungs-Vermittlungs GmbH
Ford Versorgungs und Unterstutzungseinrichtung GmbH
Ford-Werke Aktiengesellschaft
Fords Vagnskadegaranti A.B.
Hokkai Ford Tractor Co., Ltd.
Humboldt Mining Company
Oy Ford Ab
Quimica Parker, S.A. de C.V.
Saar-Industrie GmhH
Sao Francisco Maquinas e Ferramentas Ltda.

Affiliates:

Agromak, S.A. de C.V. (FTA)
Allied Tractor Limited
American Network, Inc.
Amim Holdings Sdn. Bld.
Assembly Plant Material Services, Inc.
Canapro S.A.R.L.
Carnegie Group Inc.
Carplastic, S.A.
Ceradyne Advanced Products, Inc.
Compania Financiera de Inversones y Credito S.A.
Conix Corporation
Double Eagle Steel Coating Company
Essex Manufacturing
Fabrica de Tractores Agricolas S.A.
Fairlane Woods Associates
FCP Finance Corporation

Foral Services Proprietary Ltd.
Ford Credit South Africa (Proprietary) Ltd.
Ford Vehicle Finance
General Electric Credit Auto Resale Service, Inc.
Halla Climate Control Corp.
Implementos Agricolas Mexicanos, S.A.
Iveco Ford Truck Limited
Kia
Mazda Motor Corporation
Metro Investment Service Corporation
Nascote Industries, Inc.
Nemak, S.A.
New Holland Japan Inc.
New River Casting Company
Otomobil Sanayii, A.S. (Otosan)
Oy - Ford Rahoitus Ab
Renaissance Center Partnership
Renaissance Center Venture
South African Motor Corporation (Proprietary) Limited
Sukat Real Estate Holdings
Synthetic Vision Systems, Inc.
TG Ford Associates
Trans Canada Glass Ltd.
Thace
Vitro Flex, S.A.

after the Respondents started working, Ford replaced them with preferential placement applicants. The Respondents do not challenge the Union's right to require their replacement.

Ford's replacement of Respondents had a devastating impact on them. Most had no job, having given up their previous employment to accept Ford's offer to return to work as permanent status employees. Many had made substantial purchases on credit or made other expenditures based on the income they knew they could expect from a permanent status job at Ford. Many of them were left without medical insurance coverage when they were terminated. All suffered significant emotional trauma from the sudden and unexpected loss of their jobs.

Respondents filed this lawsuit shortly after they were terminated, seeking to recover compensatory damages for the injuries they suffered as a result of Ford's misrepresentations.[2] They also sought to enforce all aspects of their hiring agreement with Ford that were not inconsistent with the Collective Bargaining Agreement. Respondents' Complaint alleges several alternative state law causes of action against Ford, including: fraud, breach of a contract for employment, promissory estoppel, breach of a covenant of good faith and negligence. They do not allege that Ford violated the Collective Bargaining Agreement in any way. (App. 3a.)

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[2]There is no issue in this case as to the removal of Respondents' action to federal court. Respondents agree with Petitioner's position that removal was proper on diversity grounds. (Petition at p. 28, fn. 10)

REASONS WHY THE PETITION SHOULD BE DENIED

1.

The Decision Of The Eighth Circuit Is Consistent With The Decisions Of This Court.

The parties in this case agree that the controlling standard for the case is set forth in the holding in *Allis-Chalmers, Inc. v. Lueck*, 471 U.S. 202 (1985). There this Court held that state law causes of action are only preempted by Section 301 of the Labor Management Relations Act "when resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract * * *". *Id.*, 471 U.S. at 220. Contrary to the Petitioner's contention, this Court has never held that the mere fact that a collective bargaining agreement exists automatically requires preemption of state common law claims brought against the employer by employees. Instead, this Court has stated:

> Nor do we hold that every state lawsuit asserting a right that relates in some way to a provision in a collective bargaining agreement, or more generally to the other parties to such agreement necessarily is preempted by Section 301.

Id., 471 U.S. at 220.

In order to determine whether a state law cause of action must be preempted, this Court set forth several factors which the lower courts must consider. These include whether the state law rights and obligations asserted by a plaintiff derive from the collective bargaining agreement, and whether evaluation of the claim is "inextricably intertwined with consideration of the terms of the labor contract". *Id.*, at 471 U.S. 213.

The Petitioner asserts that the Eighth Circuit failed to

apply the *Lueck* standard when it issued its holding in Respondents' appeal. Specifically, it argues that the majority failed to analyze whether Respondents' claims were "substantially dependent upon the analysis of the terms of [the] agreement". (Petition, p. 14.) This contention is flatly contradicted by the Opinion of the Eighth Circuit. Judge McMillian, writing for the majority, quoted this Court's holding in *Lueck* and correctly identified the factors which must be analyzed when considering a claim that a cause of action is preempted by Section 301. He stated:

> The parties agree, and we concur, that the controlling authority on the issue of preemption in this case is *Lueck*. * * * Among the facts relevant to the determination of whether a state law claim meets the "substantially dependent" standard is whether the claim derives from or is implied from contract rights established under a Collective Bargaining Agreement, and whether evaluation of the claim is "inextricably intertwined with consideration of the terms of the labor contract."

App., 5a-6a, citing *Lueck*, 471 U.S. at 213. This is precisely the test which this Court in *Lueck* directed the Courts of Appeal to apply.

The Eighth Circuit then applied this standard to the particular facts of the present case and reached two conclusions:

1. The Respondents' causes of action were not derived from the rights and obligations provided by the Collective Bargaining Agreement (App. 8a); and

2. The Respondents' claims were not inextricably intertwined with consideration of the terms of the contract,

> because they did not require any substantial interpretation of its terms. (App. 8a, 11a.)

These conclusions represent the carefully considered application by the Eighth Circuit of the proper legal standard required by this Court. In reality, the Petitioner does not disagree with the standard which the Eighth Circuit applied. It only disagrees with the outcome of the application of that standard to the particular facts of this case.

The majority's decision is also consistent with the holding in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983). There the Court found that causes of action for fraud and for breach of a contract for employment (the same causes of action which Respondents assert in their lawsuit) were not preempted by Section 301. *Belknap,* 463 U.S. at 512.

Finally, the Eighth Circuit's decision is consistent with the holding in *J.I. Case Company v. NLRB,* 321 U.S. 332 (1944), which was reaffirmed by this Court in *Belknap.* 463 U.S., at 500. The Petitioner's characterization of the holding in *J.I. Case* is simply incorrect. In both *J.I. Case* and *Belknap,* this Court specifically held that employees may have a right of action against their employer based on prehire misrepresentations and promises, and that the agreements resulting from those prehire representations are not rendered void by the existence of a collective bargaining agreement. The fact that Petitioner may have conflicting obligations to the Union through a collective bargaining agreement does not deprive other parties of their rights and remedies. See, *W.R. Grace & Co. v. Local 75,* 461 U.S. 757, 770 (1983), cited in *Belknap,* 463 U.S. at 505-506.

Thus, the Eighth Circuit holding below is consistent with

the prior holdings of this Court. The Petitioner's claim that the holding departs from the standards which this Court has required in the past lacks merit and must be rejected.

Petitioner also contends that the Eighth Circuit's decision disrupts federal labor policy favoring arbitration in disputes involving collective bargaining agreements, which was expressed by the Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). However, in order to present this argument, Petitioner assumes the very premise it must prove: that Respondents' claims are actually disputes over the terms of a collective bargaining agreement. There is no policy requiring resolution of non-contractual disputes through arbitration. In fact, it is clear that an arbitrator has no authority to resolve disputes that do not derive from the Collective Bargaining Agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). In the present case, the Eighth Circuit correctly determined that the Respondents' claims were neither derived from the Collective Bargaining Agreement nor dependent upon interpretation of its terms. Consequently, it determined that arbitration was not required. (App. 12a.)

2.

The Eighth Circuit's Decision Created No Conflict Among The Circuits Because Its Holding Was Based On The Particular And Distinguishable Facts Of This Case.

The Petitioner next argues that the decision of the Eighth Circuit is in conflict with the holdings of four other circuits: the Fifth, Sixth, Ninth and Eleventh Circuits. However, each of the cases on which Petition relies turned on significantly different facts from the present case, and required different

results when the *Lueck* standard was applied to them. The Petitioner's mischaracterization of Respondents' claims as generic wrongful discharge claims obscures this point.

Three of the holdings Petitioner cites do not address the specific issue presented by Respondents' case: whether Section 301 preempts causes of action based upon representations made to persons before they became employees. The holdings of the Sixth Circuit (*Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246 (6th Cir. 1986); *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589 [6th Cir. 1986]) and of the Eleventh Circuit (*Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied 106 S.Ct. 863 [1986]) all involve misrepresentations made to employees at the time they were covered by a collective bargaining agreement. In each case, the employer misrepresented the terms of the labor contract. The Court of Appeals in all three cases had no trouble determining that the rights asserted by the employees derived from a collective bargaining agreement and that the claims were substantially dependant upon interpretation of the terms of the labor agreement involved.[3]

The present case differs significantly from these three cases in that none of the Respondents was an employee of Ford at the time the misrepresentations were made. They were not covered by the Collective Bargaining Agreement and as a result had no rights under it. This factor demonstrates that the holding of the Eighth Circuit is not in conflict with the holdings of the Sixth and Eleventh Circuits as its holding is distinguishable from the holdings of those two circuits.

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[3]It is significant to note, however, that when the Eleventh Circuit was presented with a case involving facts similar to the Respondents' claims, it reached the same conclusion as the Eighth Circuit did in the present case. See, *Varnum v. Nu Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986) (misrepresentations made prior to hiring).

The other two cases cited by Petitioner involve facts that are somewhat similar to those in Respondents' case in that they involve misrepresentations made prior to hiring. However, those cases differ in one significant aspect: the employer in each case actually misrepresented the terms of the collective bargaining agreement to the employees. This fact presents a critical difference between those cases and the present case which affects the analysis of both the source of the right asserted and whether resolution of the claim requires interpretation of the terms of the collective bargaining agreement.

In *Eitmann v. New Orleans*, 730 F.2d 359 (5th Cir.), cert. denied 469 U.S. 1018 (1984), the employee claimed that the employer misrepresented a term of the contract regarding his right to continued employment if he was injured on the job. This was a matter that was covered by the collective bargaining agreement. *Id.*, 730 F.2d at 362-363. In *Bale v. General Telephone Company of California*, 795 F.2d 775 (9th Cir. 1986), the employee claimed the employer had misrepresented the employee's rights to advance from being a temporary employee to being a permanent employee. Again, this was a matter that was covered by the collective bargaining agreement between the the employer and the union, *Id.*, 795 F.2d at 777, 779. In both cases, the rights at issue were actually derived from the provisions of a collective bargaining agreement and therefore required interpretation of its terms. The Ninth Circuit specifically based its holding in *Bale* on this factor. *Id.*, 795 F.2d at 780.

The Respondents in the present case have not alleged that Ford misrepresented the terms of the Collective Bargaining Agreement. Instead, they contend that Ford fraud-

ulently misrepresented certain material facts. Specifically, they allege that Ford's representatives told them that the preferential hiring list was exhausted and that there were no persons left on the list who could replace them in the future. They also allege that Ford misrepresented the positions they were being offered when it told them they were being hired as regular, permanent employees, not as temporary workers who would only be filling temporary positions until additional employees could be hired through the preferential hiring list. The Respondents have alleged that each of these representations were false and were known to be false at the time they were made.

Unlike *Bale,* none of the alleged statements misrepresent the terms of the Collective Bargaining Agreement. What is at issue in the present case is what were the actual conditions existing in the company at the time Ford's representatives made the misrepresentation. Resolution of the Respondents' claims will not require interpretation of the Collective Bargaining Agreement, but will require a court to make factual determinations concerning this issue.

3.

The Holding Of The Eighth Circuit Turns On Very Specific And Particular Facts And Will Not Affect A Large Number Of Cases.

The Eighth Circuit's holding is based on its application of the *Lueck* standard to the very particular facts presented by the Respondents' case. Thus, its holding is a very limited one and applies only to other cases involving similar misrepresentations made to nonemployees prior to the time of their employment. Much of the Petitioner's

argument that this case involves an important issue with wide ranging application is based on its incorrect description of the Respondents' claims as being generic wrongful discharge claims. When Respondents' causes of action are correctly viewed as the more limited type of state law fraud, contract and quasi-contract claims involving prehire misrepresentations, it is clear that the application of the Eighth Circuit's holding is far more narrow and limited.

Review of decisions of the Courts of Appeal by this Court is most appropriate in those cases which involve questions of broad application and which will effect a large number of other cases. Because of the limited and narrow nature of the Eighth Circuit's holding, review shou'd not be granted in this case.

4.

The *Hechler* and *Caterpillar* Cases Involve Questions That Differ Substantially From The Question Decided By The Court Of Appeals.

The Petitioner's final argument is that two cases which are currently pending before this Court demonstrate the importance of the decision of the Eighth Circuit's decision. However, both cases present questions that are substantially different from the question that was actually decided by the Eighth Circuit.

The case of *I.B.E.W. v. Hechler,* No. 85-1360, involves a claim by an employee against her union for negligence in failing to assure proper training. The question presented by the case is the preemptive effect of the federal law of duty of fair representation on such a claim. *Caterpillar, Inc. v. Williams,* No. 86-526, involves an issue of removal

jurisdiction. The issue presented by that case is the propriety of the District Court's failure to remand the case to state court. The Ninth Circuit did not decide whether the employees' state common law claims were preempted by Section 301. *Williams v. Caterpillar, Inc.*, 786 F.2d 928, 937 (9th Cir. 1986).

Since both cases involve questions that are so different from the preemption question presented by Respondents' case, the *Hechler* and *Caterpillar* cases do not justify Petitioner's request that review be granted by this Court.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 1987

No. 86-1686

IN THE

Supreme Court of the United States

October Term, 1986

Ford Motor Company,

Petitioner,

v.

Kathy Andersen, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents strongly disagree with Petitioner's formulation of the question presented by this case. They believe the question presented is:

> Whether Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), preempts otherwise valid state law contract, quasi-contract and fraud claims brought by persons to whom an employer made fraudulent representations at a time when they were not employees and were not covered by a collective bargaining agreement in order to induce them to accept employment.

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IN THE

Supreme Court of the United States

No. 86-1686

October Term, 1986

Ford Motor Company,

Petitioner,

v.

Kathy Andersen, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 803 F.2d 953. The Eighth Circuit denied Petitioner's Petition for a Rehearing, which order is unreported (App. C, 18a-19a).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *.

STATEMENT OF THE CASE

The Petitioner has significantly twisted the nature of Respondents' claims by omitting the primary facts from its statement of the case. It does so in order to support its view of the question presented and to leave this Court with the incorrect impression that this case is a simple wrongful discharge claim in which Respondents challenged the employers right to discharge them from employment. In fact, Respondents' claims do not challenge their termination. Instead, their lawsuit is based upon certain misrepresentations and offers that Ford made to them before they were employees and before they became covered by the Collective Bargaining Agreement between Respondents and the United Auto Workers, International Union (hereinafter, "the Union").

The Respondents' lawsuit arises from events that occurred in the fall of 1983, when Ford's representatives contacted them for the purpose of offering them employment at Ford's Twin Cities assembly plant. During the course of their conversations with Respondents, Ford's representatives made fraudulent misrepresentations concerning the status of a preferential hiring agreement between Ford and the Union and also misrepresented the nature of the positions Ford was offering them. Respondents allege Ford told them the preferential hiring list was exhausted and that they would not be displaced in the future from the positions they were being offered because there were no persons left on the preferential hiring list to displace them. They also allege that Ford offered them positions as permanent status em-

ployees, as distinguished from positions as temporary workers. At the time these misrepresentations and offers were made, Respondents allege that Ford knew them to be false. Respondents' lawsuit is based upon these misrepresentations.

The facts surrounding Ford's misrepresentations are as follows:

Ford contacted Respondents because it was having difficulty filling positions at the plant from the preferential hiring list in time for a scheduled production increase. Ford's management had scheduled a line speed-up for the Twin Cities assembly plant, which was to begin on December 5, 1985, to increase the number of trucks the plant was producing. In order to put this line speed increase into effect, it was necessary to hire approximately 250 additional workers for the Twin Cities assembly plant. Ford began to obtain these additional workers by using the preferential hiring program which had been negotiated between Ford and the Union. (App. 3a.)

The procedure for identifying and contacting preferential placement applicants proved to take much longer than Ford anticipated. In addition, Ford failed to take into account the number of people who would decide not to stay in the Twin Cities once they had reported to work and the number of preferential employees who would either not show up at the plant when scheduled to do so, or would be disqualified by Twin Cities plant management. By mid-November, Ford's manpower projections for the Twin Cities plant showed that it would be approximately 50 employees short of the number of new workers it would need by the date the line speed increase was to begin. (C.A. App. 132.)

In order to make up this shortfall and meet the December production schedule, Ford contacted the Respondents and offered them jobs at the Twin Cities plant. The Respondents (with one exception) were all people who had previously worked at the Twin Cities assembly plant but had been laid off in 1980 as a result of the recession in the auto industry. None of the Respondents were covered by the Collective Bargaining Agreement. They had no rights to be recalled to work at the Twin Cities plant, since their seniority rights had expired and they were not eligible for the preferential hiring list. (C.A. App. 133.)

Because Respondents were former employees who had some familiarity with the Collective Bargaining Agreement, they were aware of the preferential hiring list and the process of acquiring seniority. As a result, many of them asked whether the preferential hiring list was exhausted and what their status as employees would be if they came to work at the plant. They wanted to know whether they would be permanent or temporary employees. Ford told them that they were being offered employment as permanent status employees and were not being offered temporary positions. Ford also told them that the preferential hiring program had been completed and that they would not be replaced in the future by preferential placement applicants as there were none left on the list to replace them. (C.A. App. 92-94, 96.)

Prior to accepting Ford's offer, the Respondents also attended group orientation sessions at the Twin Cities assembly plant. They asked the same questions at these sessions and they were again told the same thing: The jobs they were being offered were permanent jobs. The preferential hiring list had been exhausted. so they would not be replaced by preferential placement applicants. The only

possibility of being laid off in the future was if a major downturn in the economy occurred. Based on these answers to their questions, the Respondents accepted Ford's offer for employment as permanent employees and started working at the Twin Cities assembly plant. (C.A. App. 92-94.)

All of the statements which Ford's representatives made concerning the preferential hiring list and the permanent nature of their employment status were in fact misrepresentations. The reality was that the Respondents were only temporary employees, hired by Ford to meet its production schedule at the Twin Cities assembly plant and to fill in until it could process enough preferential placement applicants to replace them. The preferential hiring list had not been exhausted. Several thousand preferential placement applicants remained on this list and were eligible for employment at the Twin Cities assembly plant. (C.A. App. 94.) Ford had simply underestimated how long it would take to get enough of them to the Twin Cities. [1]

Shortly after Respondents began working for Ford, the Union learned that Ford had circumvented the preferential placement agreement by hiring people to work at the Twin Cities assembly plant who were not on the preferential hiring list. It immediately demanded that the Respondents be replaced by preferential placement applicants as required by the agreement. In February 1984, less than 90 days

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[1]Ford states in its Petition that the Respondents could have been replaced under the terms of the Collective Bargaining Agreement after they were hired if new names were added to the preferential list during Respondents' probationary periods. (Petition, p. 18 at fn. 7) Respondents do not dispute this contention. However, it is irrelevant to their claims. Their claims grow out of the false representations Ford made to Respondents. Respondents allege that, at the time Ford told them the preferential list was exhausted and that no preferential employees remained on the list to bump them, there were actually several thousand preferentials on the list. Whether or not this allegation is true is the key factual determination presented by Respondents' case.

No. 86-1686

In the Supreme Court of the United States

OCTOBER TERM, 1986

FORD MOTOR COMPANY, PETITIONER

v.

KATHY ANDERSEN, *et al.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

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1. Although both the majority (Pet. App. 11a-12a) and the dissent (*id.* at 15a) in the court of appeals acknowledged that the circuits are in conflict over the issue in this case, respondents vehemently deny the existance of a conflict. According to respondents, this case is distinguishable from the Fifth, Sixth, Ninth and Eleventh Circuit cases described in the Petition because the alleged misrepresentations here (a) were made before respondents became employees and (b) did not concern respondents' rights under the collective bargaining agreement. But respondents' first distinction is irrelevant to the preemption issue under Section 301, and their second distinction is simply inaccurate.

First, respondents claim (Br. in Opp. 11) that this case is unique because Ford's alleged misrepresentations were made *before* they accepted offers of employment. The plaintiffs in *Eitmann* and *Bale*, however, also alleged that their state law claims were based upon false statements

made prior to the time they became employees. See *Eitmann*, 730 F.2d at 360; *Bale*, 795 F.2d at 777. The Fifth and Ninth Circuits nonetheless held that the plaintiffs' claims were preempted by Section 301, because (a) adjudication of the claims would have required interpretation of the collective bargaining agreement and (b) the claims accrued at a time when the plaintiffs were members of the collective bargaining unit and had access to the grievance procedures of that agreement. See *Eitmann*, 730 F.2d at 362-363; *Bale*, 795 F.2d at 779-780.

Here, too, the timing of the alleged false statements is quite beside the point. Just as in *Eitmann* and *Bale*, a court hearing respondents' tort and breach of contract claims would be forced to interpret the Ford-UAW agreement, and respondents' claims all result from the termination of their employment with Ford, which occurred at a time when they unquestionably were covered by the Ford-UAW agreement and could have pursued their rights under that agreement.[1] Accordingly, as in *Eitmann* and *Bale*, these state law claims should have been held preempted by federal law.

Indeed, no other result would make sense, given the policies that the Section 301 preemption doctrine is designed to serve. The crucial question under *Lueck* is whether "any attempt to assess liability on the part of the employer would inevitably involve interpretation of the underlying collective-bargaining contract" (*International Brotherhood of Electrical Workers* v. *Hechler*, No.

[1] Respondents are plainly wrong in stating that "[t]hey were not covered by the Collective Bargaining Agreement and as a result had no rights under it" (Br. in Opp. 11). As we noted in the Petition (at 19), the agreement expressly covered probationary employees, such as respondents, who had been on the job for more than 30 days, and both parties to the agreement—Ford and the UAW—were of the view that respondents' terminations could have been challenged through the grievance mechanism. Respondents do not cite a single provision of the agreement or arbitration decision construing the agreement to support their self-serving interpretation.

85-1360 (May 26, 1987), slip op. 7) and would thus jeopardize the need for uniformity in the interpretation of labor contracts through arbitral dispute resolution. As the Court recently remarked in *Hechler*, slip op. 6 (quoting *Lueck*, 471 U.S. at 211):

> [I]f state law * * * were allowed to determine the meaning of particular contract phrases or terms in a collective-bargaining agreement, "all the evils addressed in *Lucas Flour* would recur"; the "parties would be uncertain as to what they were binding themselves to" in a collective-bargaining agreement, and, as a result, "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate."

It is obvious that Congress's goal of uniformity in contract interpretation would be jeopardized whenever state law is allowed to govern the meaning of terms in a collective bargaining agreement. Respondents do not offer *any* rationale for a distinction based upon the timing of a false statement said to make a later job termination unlawful.[2]

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[2] Respondents assert (Br. in Opp. 11 n.3) that their reading of *Lueck* is supported by the Eleventh Circuit's recent decision in *Varnum*, but that decision is plainly distinguishable. The employee in *Varnum* challenged his employer's pre-hire failure to disclose pending changes in the collective bargaining agreement, rather than alleging that his employer misrepresented employment conditions under that agreement. 804 F.2d at 640. Thus, it would not have been necessary for a court to construe the terms of the agreement by reference to state law. Moreover, Varnum's "failure to disclose" claim was not an attempt to enforce an individual contract of employment and thus raised none of the concerns about "individual dealings" that pervade this case, *Eitmann* and *Bale*. Finally, because Varnum resigned, his injuries were not the result of an employer-initiated layoff or discharge, and therefore his request for relief (which did not involve a demand for reinstatement) could not have been processed through the contractual grievance mechanism. These differences may explain why the Eleventh Circuit in *Varnum* did not mention, much less attempt to reconcile its ruling with, *Lueck*, *Mason*, or *Redmond*. See Pet. 24 & n.8.

Second, respondents contend (Br. in Opp. 12) that *Eitmann* and *Bale* are distinguishable because "the employer in each case actually misrepresented the terms of the collective bargaining agreement to the employees" whereas "[t]he Respondents in the present case have not alleged that Ford misrepresented the terms of the Collective Bargaining Agreement." Respondents are wrong on both scores.

In neither *Eitmann* nor *Bale* was the finding of preemption based on the notion that the employees' state law cause of action charged the employer with misrepresenting the terms of the collective bargaining agreement *per se*. Thus, in *Eitmann*, the Fifth Circuit's discussion of the collective bargaining agreement (730 F.2d at 360-361), the plaintiff's complaint and his theory of the case (*id.* at 361-362), and the defendant's employment practices and "the industrial common law" (*id.* at 363) all made clear that nothing in the agreement expressly dealt with continuation of compensation during periods of disability resulting from work-related injuries. In fact, Eitmann attempted to avoid preemption by arguing that the collective bargaining agreement did not address the subject of his claims and that his claims therefore were "not inconsistent with" the terms of the agreement. *Id.* at 362.

Moreover, the Fifth Circuit did not rule against Eitmann because it concluded that the rights he asserted were derived from the collective bargaining agreement. Rather, the court found that Eitmann's claim of an individual contract with his employer, which would have precluded his discharge because of disability, sought "to 'limit or condition' the terms of the collective bargaining agreement, which established the terms and conditions of employment, including discharge." *Eitmann*, 730 F.2d at 363. The Fifth Circuit refused to allow an "employee[] who [was] covered by a collective bargaining agreement * * * to bring an action on an alleged *separate* contract." *Id.* at 364 (emphasis added).

Similarly, in *Bale*, the plaintiffs alleged that they were terminated in violation of pre-hire promises that they would become "regular" rather than merely "temporary" employees. Like respondents, the plaintiffs in *Bale* contended that their state law claims arose not from the interpretation of the collective bargaining agreement but from *separate* and *unrelated* pre-hire representations. 795 F.2d at 779. The Ninth Circuit held that the plaintiffs' claims nonetheless were preempted by Section 301:

> In order to prove their * * * claims, [the plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

795 F.2d at 780, quoting *Lueck*, 471 U.S. at 220.

Thus, contrary to respondents' revisionist view (Br. in Opp. 12), the plaintiffs in both *Eitmann* and *Bale* alleged that their state claims were based on pre-hire representations wholly separate and distinct from the terms of the collective bargaining agreement. The Fifth and Ninth Circuits accepted that characterization, but held that the claims still were preempted by Section 301 because their resolution would require interpretation of the labor agreement. This case is indistinguishable from *Eitmann* and *Bale* and compels precisely the same conclusion.

In any event, even if respondents' reading of *Eitmann* and *Bale* were plausible, it would not distinguish those cases from the present one. Simply stated, it is preposterous for respondents to suggest that their state law claims do not involve the contention that Ford misrepresented their rights under the collective bargaining agreement. Respondents' complaint asserts, for example, that

Ford misrepresented that it "was offering [respondents] • • • work as permanent, full-time employees" and that respondents "would not be laid off unless there was a slump in the economy and in truck sales" (C.A. App. 92). As former Ford employees (see Br. in Opp. 4), however, respondents certainly were aware that the terms and conditions of their employment would be governed by the Ford-UAW agreement. Accordingly, the allegations in their complaint can only be read to mean that Ford misrepresented what their rights would be under that agreement.

2. Respondents attempt to belittle the importance of the question presented by arguing (Br. in Opp. 9) that this case involves nothing more than an application of the test announced in *Lueck* to a particular set of facts. To the contrary, the case involves a legal issue that arises with great frequency, the lower courts are hopelessly confused about how the *Lueck* test applies, and there is a compelling practical need for a clear answer. As we pointed out in the Petition (at 27), and as the large number of recent appellate decisions confirms, "it would be the rare employee who could not package his complaint as an 'independent' state cause of action by recalling pre-hire statements seemingly at odds with his subsequent termination." Moreover, if the decision below represents a correct application of the *Lueck* standard, then *Lueck* means very little indeed.

Respondents repeatedly urge that "[t]hey do not allege that Ford violated the Collective Bargaining Agreement in any way" (Br. in Opp. 6) and that their "causes of action were not derived from the rights and obligations provided by the Collective Bargaining Agreement" (*id.* at 8). These assertions, however, merely indicate that respondents misunderstand the relevant test for Section 301 preemption. The controlling standard under *Lueck* is *not* whether an employee's state law claim derives from or alleges a violation of a collective bargaining agreement, but whether "resolution of [the] state-law claim

is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" (*Lueck*, 471 U.S. at 220). See *Hechler*, slip op. 1.[3]

We explained in the Petition why it would be impossible to resolve respondents' claims without confronting the meaning of the Ford-UAW contract at every turn. It would be necessary to construe the collective bargaining agreement to determine whether respondents' alleged pre-hire contracts conflicted with the agreement and whether Ford's alleged pre-hire statements misrepresented the agreement. See Pet. 14, 17-18. It would be necessary to construe the collective bargaining agreement to determine the validity of various defenses. See *id.* at 15-16. And it would be necessary to construe the collective bargaining agreement to determine the relief to which respondents would be entitled if their discharges were unlawful. See *id.* at 16-17 & n.5. Respondents make no attempt to answer these arguments.

Indeed, respondents' requests for relief show why this case poses a far more serious threat to federal labor law policies than *Lueck* itself. The issue in *Lueck* was whether an employee could bring a state law tort claim alleging that his employer acted in bad faith in refusing

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[3] Of course, even if respondents' test were the correct one under *Lueck*, their claims would not meet it. Thus, although respondents deny relying on the collective bargaining agreement, their complaint makes repeated reference to that agreement (see C.A. App. 91, 95, 99, 102). Similarly, although respondents assert that "their claims do not challenge their termination" (Br. in Opp. 2), respondents' complaint expressly and repeatedly refers to their terminations as an essential element of their causes of action (see C.A. App. 95 (¶ 18), 96 (¶ 21), 99 (¶¶ 33, 34), 100 (¶ 38), 101 (¶ 49)) and expressly seeks reinstatement and other rights under the Ford-UAW agreement as a remedy (see C.A. App. 102 (¶ 3)). Finally, respondents can hardly deny that their claims "derive from" the administration of the preferential placement agreement. See Pet. 17-18 & n.7.

to make disability insurance payments under a negotiated disability plan. The state court could have awarded relief in that case without substantially affecting the rights of the union or the other members of the collective bargaining unit. The Court nonetheless held that the state claim was preempted because the litigation would adversely affect "[t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law" (*Lueck*, 471 U.S. at 211) and would "eviscerate a central tenet of federal labor-contract law under § 301" favoring resolution of disputes through arbitration (*id.* at 220).

Compare the situation here. Relying on their rights under *state* law, and asserting *both* tort and contract claims, respondents have demanded reinstatement to their bargaining unit positions (C.A. App. 101-102 (¶ 1)), with back pay and fringe benefits measured by the provisions of the Ford-UAW agreement (C.A. App. 102 (¶ 3)); they have demanded specific performance of Ford's alleged promises to let them work for 10 to 20 years as "permanent, full-time employees" who "would not be laid off unless there was a slump in the economy" (C.A. App. 102 (¶ 2); see also C.A. App. 93 (¶ 9)); and they have demanded retroactive seniority (C.A. App. 102 (¶ 1)).

It is not difficult to envision the devastating impact that a grant of this relief would have on the collective bargaining relationship and the rights of the Union and other Ford employees. It would create a class of super-employees at Ford with rights—specified in separately-negotiated individual agreements, and enforced by an injunction issued under state law—that go far beyond those set forth in the Ford-UAW contract; it would jump junior employees over senior employees in seniority; and it might well require the dismissal of current members of the work force. Respondents make no attempt to explain

how these results can possibly be squared with federal labor policy.

Respectfully submitted.

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(3)

No. 86-1686

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OCTOBER TERM, 1986

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The Chamber of Commerce of the United States ("the Chamber") hereby moves, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of the petition for writ of certiorari. Consent to the filing of this brief has been obtained from counsel for petitioner and counsel for respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.[1] Counsel for the individual respondents has refused consent.

The Chamber, a non-profit membership organization, is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships, and proprietorships, as well as several thousand trade associations and state and

[1] Copies of the consent letters have been filed with the Clerk of the Court.

local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on labor relations matters before all branches of the federal government. Toward that end, the Chamber has filed *amicus curiae* briefs in this Court in a number of labor relations cases.

Many of the Chamber's members are parties to collective bargaining agreements, and the issue presented by this case potentially affects every employer who is a party to such an agreement. Accordingly, the Chamber is peculiarly able to present to the Court the views of the business community on the issues presented in this case and offers a potentially broader perspective than that provided by the parties before the Court.

The case before the Court raises significant issues concerning the preemptive scope of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and, more fundamentally, the very scope of the collective bargaining relationship. The Eighth Circuit's very narrow view of these issues ignored the prior holdings of this Court and the fundamental underpinnings of the national labor policy. Uncertainty in labor relationships and inconsistency from state to state are necessary results of its decision. However, the major consequence of the decision below will be a substantial weakening of the arbitration process, because the Eighth Circuit has made circumvention of that process an easy task. As a result, the Chamber requests permission to submit its views on these important issues.

WHEREFORE, the Chamber respectfully requests that its Motion be granted.

Respectfully submitted,

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May 29, 1987

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

The Chamber of Commerce of the United States ("the Chamber") respectfully refers the Court to the description of its interest presented in its Motion for Leave to File Brief to which this brief is attached.

REASONS FOR GRANTING THE WRIT

In holding that state tort and contract claims brought by bargaining-unit employees challenging their layoffs are not preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, the Eighth Circuit has threatened the continued vitality of grievance and arbitration procedures under collective bargaining agreements. In the process, it has brought itself into

conflict with decisions of this Court and decisions of other circuits on the preemption issue, it has ignored this Court's holdings concerning the relationship between "individual" contracts and collective bargaining agreements, and it has created a mechanism by which virtually every employee dissatisfied with an action of his employer may bypass the arbitration procedure and present his grievance to a judge and jury.

I

THE ISSUE PRESENTED IN THIS CASE IS A FREQUENTLY RECURRING ONE THAT REQUIRES RESOLUTION BY THIS COURT

As the Petition for Certiorari ably demonstrates, the circuits are hopelessly confused on the question of whether Section 301 preempts state tort and contract claims based upon representations relating to the terms and conditions of employment allegedly "independent" of the collective bargaining agreement. Pet. at 21-27. In fact, the court below expressly recognized that its decision was in conflict with the Ninth Circuit's decision in *Bale* v. *General Tel. Co.*, 795 F.2d 775 (9th Cir. 1986), yet stated that "we do not agree with the court in *Bale* that adjudication of these state-law claims requires any significant reference to the terms of the collective bargaining agreement." Pet. App. at 11a-12a.[2] Consequently, held the court, respondents' action was not preempted under this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985).

Lower courts need guidance from this Court on the issue presented in this case. As one district judge in the Eleventh Circuit noted with some understatement upon observing not only the intercircuit conflict on this issue but also the conflict within his own circuit, "[T]he cases on such issues play across the

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[2] The court did note that *Bale* was distinguishable from the case before it since the plaintiffs in *Bale* had brought a Section 301 claim concurrent with their state-law claims. However, to the extent that the court viewed the issue as one of election of remedies, it was in error. If Section 301 preempts the state-law claims at issue—as it does—it does so without regard to whatever other claims an employee may bring.

keyboard without full harmony." *Darden* v. *United States Steel Corp.*, 124 L.R.R.M. 2688, 2692 (N.D.Ala. 1987). Had the judge foregone the understatement, he would have said that, rather than merely lacking full harmony, the cases are wholly discordant, producing a cacophony of conflicting sounds that require resolution by this Court.

The issue presented in this case is not one that will go away. State courts are becoming increasingly protective of the job security of non-union employees, as, of course, they are entitled to do. *See* Lopatka, *The Emerging Law of Wrongful Discharge — A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 Bus. Law. 1 (1984). However, because of the breadth of the state-court remedies — including damages for emotional distress as well as punitive damages — bargaining-unit employees are often not satisfied with the traditional remedies of reinstatement and backpay available through the grievance process. Thus, "[t]o escape th[e] exclusivity [of grievance and arbitration procedures], employees frequently attempt to avoid federal law by basing their complaint on state law, disclaiming any reliance on the provisions of the collective bargaining agreement." *Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1472 (9th Cir. 1984). As the Petition for Certiorari shows, most courts have looked behind the facile assertion that the claims are based on "separate" contracts. Pet. at 26 and n.9. However, several courts, including the court below, have refused to restrict bargaining-unit employees to the remedies established by the collective bargaining agreement. *See, e.g., Malia* v. *RCA Corp.*, 794 F.2d 909 (3d Cir. 1986), petition for cert. filed, No. 86-990 (Dec. 15, 1986); *Caterpillar Inc.* v. *Williams*, 786 F.2d 928 (9th Cir.), *cert. granted*, 107 S.Ct. 455 (1986); *Varnum* v. *Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3772 (May 18, 1987). This Court should resolve the conflict by making clear that bargaining-unit employees must pursue their claims under the grievance procedure of the labor agreement.

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT CONCERNING THE NATURE OF THE COLLECTIVE BARGAINING AGREEMENT AND PREEMPTION UNDER SECTION 301.

The Eighth Circuit committed two fundamental errors in reaching its conclusion that the claims at issue were not preempted. First, it erred in concluding that evaluation of respondents' claims will not "require extensive interpretation of the terms of the labor agreement." Pet. App. at 8a. As the Petition for Certiorari establishes, consultation of the collective bargaining agreement is necessary to make such determinations as whether the alleged misrepresentations were material and whether reliance on the alleged misrepresentation was reasonable. Pet. at 17-18. Consequently, this Court's decision in *Lueck, supra*, mandates that the claims be held preempted.

More fundamentally, however, the court misunderstood the teachings of this Court concerning the nature of collective bargaining agreements. The court concluded that respondents' claims of permanent-status employment were not preempted because they were based upon promises "separate from the collective bargaining agreement." Pet. App. at 9a. How did the court reach that conclusion? It did so simply by looking at the complaint and determining that as a matter of *fact* the complaint did not *purport* to be based upon the collective bargaining agreement, despite the fact that the complaint made repeated reference to that agreement. *See* Pet. at 14. Its analysis was faulty, however, in its failure properly to analyze whether as a matter of *law* the claims *must*, if they were to survive, be based on the collective bargaining agreement.

This Court's opinions make clear two propositions ignored by the Eighth Circuit. First, the collective bargaining agreement is more than a mere contract, all of the terms of which are embodied in the written agreement. It is a comprehensive constitution covering employer-employee relations that governs "the whole employment relationship," *United Steelworkers of America*

v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960), rather than simply one of many coequal contractual arrangements governing the terms and conditions of employment of bargaining-unit members. In addition to the written agreement itself, the parties are also bound by the "common law of the shop," *id.* at 580, which is made up of policies, customs, past practices, and arbitration decisions. Thus, it is error to say that a claim is not based on the collective bargaining agreement merely because there is no claim that any express written provision of the agreement has been violated.[3]

The second proposition ignored by the Eighth Circuit is that "individual contracts" between employers and bargaining-unit employees are generally invalid. In *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 337 (1944), this Court established that individual contracts may not be used "to limit or condition the terms of the collective agreement." Although the Court acknowledged that it was "not called upon to state that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement," it noted that "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantages." *Id.* at 338-339. Instead, stated the Court, "individual advantages or favors will generally in practice go in as a contribution to the collective result." *Id.* at 339.

Rather than following the teachings of *J.I. Case*, the Eighth Circuit issued an opinion that is in direct conflict with it. In what has to be an unprecedented decision, it held that individual contracts are valid *even if they are inconsistent with the collective bargaining agreement.* It stated: "[W]e do not think that because Ford had the right to displace appellants under the terms of the collective bargaining agreement, the company also had the right . . . to avoid contractual or quasi-contractual obligations based on pre-employment promises."[4] Pet. App. at 10a. In reaching its

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[3]In fact, as noted at pages 12-14, *infra*, claims such as those of respondents can be pursued through arbitration.

[4]The court mistakenly relied upon *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983), in reaching that conclusion. In *Belknap*, the plaintiffs were strike replacements who had been offered permanent work but were

amazing conclusion, the Court of Appeals relied on the opinion of this Court in *J.I. Case* for the proposition that "an individual hiring agreement, the scope of which is separate and distinct from a collective bargaining agreement, can create legally enforceable rights and obligations." Pet. App. 9a-10a n.7. The quoted portion of the opinion is an unremarkable proposition in some circumstances, but in the Eighth Circuit opinion it begs the question. The question is whether the individual contracts have a "scope" that is "separate and distinct" from the labor agreement. The Eighth Circuit concluded that they did, finding "significant" the fact that the contracts were entered into prior to the employees' entry into the bargaining unit.[5] However, it is difficult to understand how the court could conclude that the "scope" of the individual contracts was "separate and distinct" from the collective bargaining agreement when they both covered the same subject — the right *vel non* to permanent-status employment. Given that the collective bargaining relationship governs "the whole relationship," an individual contract outlining the terms and conditions of employment cannot, except in the most unusual circumstances, have a scope that is separate and distinct from the collective bargaining agreement.

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replaced by strikers as part of a settlement. They brought a state-law contract action against their employer, and the employer contended that the contract claims were preempted by the National Labor Relations Act. This Court held that neither the preemption doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), nor the preemption doctrine of *Machinists* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), barred the contract action. However, the doctrine of preemption under Section 301 was not even involved in the case, since the plaintiffs had at no time been members of the bargaining unit.

[5]Although the court found the timing of the contracts "significant," it is unclear whether it found their timing determinative. If the court believed the scope of the contracts to be separate because the independent contracts did not rely on the collective bargaining agreement, it is not readily apparent that it should make any difference when the contracts were entered into.

In sum, the view taken by the Eighth Circuit is wholly at odds with a proper understanding of the nature of the collective bargaining agreement. Rather than viewing the independent contracts as "subsidiary to the terms" of the collective bargaining agreement as required by *J.I. Case,* 321 U.S. at 336, the court elevated these contracts to a status coequal with — or even superior to — the collective bargaining agreement. Yet, this Court in *Lueck* held that "state law rights and obligations that do not exist independently of private agreements . . . are preempted by those agreements." 471 U.S. at 213. Respondents' contract claims plainly do not exist independent of private agreement, since they are alleged to be products of such agreement. As to the fraud claims, the Court of Appeals was of the view that "the standards for judging fraudulent misconduct [do not] derive from any contractually-established expectations of the parties." Pet. App. at 8a. Yet, to state a claim for fraud all that one need allege is a breach of contract and a intention at the time of contracting not to perform. Thus, if the contract claims do not survive, neither should the fraud claims, since to allow otherwise would, to paraphrase this Court in *Lueck,* "elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for [fraud]." 471 U.S. at 211.

III

THE COURT OF APPEALS' DECISION PERMITS VIRTUALLY EVERY DISPUTE BETWEEN EMPLOYER AND BARGAINING-UNIT EMPLOYEE TO BE CHARACTERIZED IN SUCH A WAY AS TO BYPASS THE ARBITRATION PROCEDURE OF THE COLLECTIVE BARGAINING AGREEMENT.

Although respondents will no doubt argue that the issue raised by the petition is in some way unusual and therefore undeserving of review by this Court, nothing could be further from the truth. The discussion above concerning the conflict in the circuits demonstrates that the issue presented by the petition is a frequently recurring one about which lower courts require guidance. Not only are there a number of cases with facts virtually identical to this case — that is, bargaining-unit employees claiming that

their layoff conflicted with prehire promises[6] — the breadth of the rule announced by the court below ensures that its analysis will apply in a broad range of fact situations, seriously undermining this Court's stated preference for resolution of such disputes through arbitration.

The national labor policy is built on the foundation of private dispute resolution.[7] As this Court has recognized, "[a]rbitration is the means of solving the unforeseeable by molding a system of private law *for all the problems which may arise* and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *Warrior & Gulf*, 363 U.S. at 581 (emphasis added). If every dispute between employer and employee could be brought in court, the arbitrator, who now occupies a central role in the collective bargaining relationship, would be displaced altogether. In order to avoid a wholesale replacement of arbitration by state-law litigation, "the means chosen by the parties for settlement of their differences under a collective bargaining agreement [must be] given full play." *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960).

The reasoning of the Eighth Circuit would allow bargaining-unit employees to circumvent the arbitration procedure simply by pleading their grievance as based upon private individualized assurances rather than on provisions of the collective bargaining agreement. Respondents alleged that they had been assured of the following: 1) they would be "permanent, full-time employees" as that term was defined by the collective bargaining agreement; 2) they would not be laid off unless there was a slump in the

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[6]*See, e.g., Caterpillar Inc.* v. *Williams*, 786 F.2d 928 (9th Cir.), *cert. granted*, 107 S.Ct. 455 (1986); *Darden* v. *United States Steel Corp.*, 124 L.R.R.M. 2688 (N.D. Ala. 1987).

[7]Section 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

economy and in truck sales;[8] 3) they would not be laid off due to hiring of other former Ford employees from a preferential hiring list; and 4) the preferential hiring list had been exhausted. These contentions fall into three general categories that would also include any number of other allegations by disgruntled employees. The first claim falls into the category of contentions that the employee's classification under the collective bargaining agreement was misrepresented. The second and third claims are in the category of contentions that the employee had a side agreement with his employer outlining the terms and conditions of his employment that existed irrespective of the terms of the collective bargaining agreement. The fourth claim is in the category of contentions that an historical fact material to the terms and conditions of the employee's employment had been misrepresented. Contrary to the Court of Appeals' conclusion, all of these contentions could have been pursued through arbitration.[9]

The first category of wrong alleged by respondents — that the employer misrepresented their status under the collective bargaining agreement — would cover a vast variety of potential claims. For example:

> 1. A "Laborer B" making $7.00 per hour claims that he was told in his preemployment interview that he was going to be hired as a "Laborer A" at $8.00 per hour. He sues in state court for reclassification and back pay.[10]

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[8]Presumably, layoffs due to a reduction in the labor force caused by mechanization would also violate their contracts, notwithstanding anything that the collective bargaining agreement might say about management's rights to implement such changes and to control the size of its work force.

[9]It is important to emphasize that the issue is not *whether* the employee may pursue such claims, but rather *where* they should be pursued.

[10]Under the Eighth Circuit's view, it would be a matter of no consequence that the collective bargaining agreement expressly provided that all Laborers were to be hired as Laborer B's, just as in the instant case the collective bargaining agreement provided that all employees were to be hired as probationary employees subject to bumping.

2. A new employee assigned to the night shift claims that he was told prior to employment that he would be assigned to day shift. He sues in state court seeking transfer to the day shift and for emotional distress damages because of the strain that night work has put on his marriage.

Similarly, an assortment of allegations of the nature of respondents' second and third claims could be advanced — that is, that the employee had a "side agreement" concerning the terms and conditions of employment that was entirely divorced from the collective bargaining agreement. Unlike the prior example, which involves the issue of where within the collective bargaining agreement the employee is initially placed, this class of wrongs relates to promises allegedly made concerning the terms and conditions of employment without reference to the collective bargaining agreement. Thus, the employer is subject to two sets of possibly conflicting contractual obligations on the same subject. A broad variety of analogous state law claims could thus be brought:

1. An employee properly laid off under the collective bargaining agreement claims that when interviewed for the job, he was guaranteed employment for a minimum of ten years, even though the collective bargaining agreement provides that the employer retains the right to adjust the size of its work force at any time. *Darden* v. *United States Steel Corp.*, 124 L.R.R.M. 2688 (N.D. Ala. 1987) (held preempted).

2. An employee claims that he was told prior to hire that he would receive a wage increase after six months even though the collective bargaining agreement provides that employees are not eligible for such increases until they have been employed for one year.

3. An employee claims that prior to being hired he was advised that if he suffered work-related injuries he would receive full compensation during any period of total or partial disability. *Eitmann* v. *New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (held preempted).

4. An employee claims that he was assured prior to being hired that he would be guaranteed 10 hours overtime per week

even though the collective bargaining agreement guarantees only 40 straight-time hours per week.

5. An employee claims that he was assured prior to being hired that he would not have to work overtime if he did not want to, even though the collective bargaining agreement expressly reserves management's right to require up to eight hours of overtime per week.

6. An employee claims that he was guaranteed that if the plant were shut down, he could transfer to another plant, even though the collective bargaining agreement specifies the consequences of a shutdown, which do not include transfer. *Caterpillar, Inc.* v. *Williams*, 786 F.2d 928 (9th Cir.), *cert. granted*, 107 S.Ct. 455 (1986) (Court of Appeals implied not preempted).

7. Employee claims that he was told that he would not be disciplined for tardiness if he were less than one hour late, even though the collective bargaining agreement specifies that any tardiness is grounds for discipline.

The Eighth Circuit's analysis would also permit state law claims that some historical fact was misrepresented during a pre-employment interview:

1. An employee laid off pursuant to the terms of a collective bargaining agreement due to a slump in business that preexisted his hire (or at least could have been forecasted prior to his hire) claims that he was told when hired that business was good and that he would not be laid off.

2. An employee who is not allowed to work the overtime that he wants contends that at the time he was hired he was falsely told that a major new order had come in and that he would therefore have the opportunity to work as much overtime as he wanted.

Just as in the instant case, each of the above-described hypotheticals can be characterized as not deriving from the collective bargaining agreement, but originating "solely in [state] common law." Fundamentally, what the Eighth Circuit opinion means is that virtually every action taken by an employer can be challenged under state law — even if wholly consistent with, *or*

even expressly authorized or required by, the collective bargaining agreement — if the employee contends that he was informed differently at the time of hire.

The Eighth Circuit's analysis appears to have been based at least in part on the erroneous view that none of the above examples would be subject to the grievance and arbitration procedure of the collective bargaining agreement because none involves a claim that any provision of the collective bargaining agreement was breached.[11] However, just as the court relied on a "crabbed reading" of *Lueck*, Pet. App. at 13a (Bright, J., dissenting), the court also relied on a crabbed interpretation of the scope of the collective bargaining relationship in general and the scope of the grievance and arbitration procedure in particular.

Arbitration decisions make clear that claims such as those of respondents are "grist for the arbitration mill." *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219, 1224 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986). Numerous arbitrators have entertained claims of the kind that respondents allege. For example, in *Armco, Inc.*, 79 L.A. 330 (1982) (Wren, Arb.), the Union filed a grievance on behalf of certain laid-off employees contending that the employees had been promised by a supervisor that upon their acceptance of a job at a different mine they would retain their seniority rather than obtaining a new seniority date as provided in the collective bargaining agreement. The arbitrator entertained the grievance, although he ultimately found that the Union had failed to prove the existence of the alleged promise. In any event, concluded the arbitrator, given the clarity and well-publicized nature of the portion of the collective bargaining agreement dealing with transfers, the grievants "would not have been entitled to rely on such a supposed promise." 79 L.A. at 333. Thus, the arbitrator not only accepted the proposition that promises by a supervisor could be enforced under the arbitration provision of the agreement, he also recognized — unlike the Eighth Circuit — the

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[11] An alternative reading of the court's reasoning is that although the claims may have been grievable, the grievance process was not exclusive. *See* Pet. App. at 12a ("appellants cannot be compelled to use the contract grievance procedure to settle their dispute with Ford").

need to consult the agreement to ascertain the reasonableness of any reliance by the employees on the promise.

In a similar case, the arbitrator entertained a grievance brought by an employee who claimed that he had been promised at the time of his hire that after successful completion of his probationary period, his wage rate would be raised to the top of the wage range established in the collective bargaining agreement for his classification. *Dempster Brothers, Inc.*, 69-1 Arb. (CCH) ¶ 8194 (1968) (Cantor, Arb.). Although the employer argued that since no breach of the provisions of the labor agreement was alleged, no proper grievance was involved, the arbitrator stated: "A specific agreement made with the employee would properly be a part of his employment under the general collective bargaining agreement and would be enforceable by grievance procedures." *Id.* at 3670. Of course, the Eighth Circuit view is to the contrary, since under its view the individual agreement was entirely separate from collective agreement.

Another arbitration case that the Eighth Circuit presumably would have found non-arbitrable is *U.S. Pipe & Foundry Co.*, 54 L.A. 820 (1970) (Jones, Arb.), in which the grievant, who had resigned from his employment, contended that he was entitled to vacation pay for unused vacation. After examining the collective bargaining agreement and determining that the grievant was not entitled to such payments under the contract, the arbitrator nonetheless ordered the company to make the payment because the grievant's supervisor had promised him that he was entitled to it. Importantly, the arbitrator acknowledged that his task of resolving the conflict between a correct interpretation of the labor agreement and the responsibility of the company for statements made by supervisors would have been much more difficult if enforcing the promise by the supervisor would have interfered with the rights of any other employees under the agreement. The Eighth Circuit, on the other hand, apparently views resolution of that conflict as a matter of state law, since it was perfectly content in the instant case to permit respondents' claims to go forward even though the remedy they were seeking was preferential seniority.

Notwithstanding the arbitrability of the above claims, the Eighth Circuit's decision permits employees to bypass the arbitration procedure and pursue their grievances under state law. Under the Eighth Circuit's analysis, all that is required to state a claim that will survive a motion to dismiss is to allege that although the employee's discharge did not violate the collective bargaining agreement, it did violate a private understanding that the employee and employer had reached in a pre-employment interview. Given that the claims are purportedly unrelated to the collective bargaining agreement, it would be purely a matter of state law how explicit the "promise" must be to be enforceable. In the ever-increasing number of states which recognize implied contracts of job security, few employees could not provide *some* evidence that could arguably support the implication of such a promise. In such a case, it would then be for a jury to decide whether such a promise could be implied. It is hard to imagine a situation that would be more disruptive to the collective bargaining relationship.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced by petitioner, the petition should be granted.

Respectfully submitted,

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